163 U.S. 93

TRANSCRIPT OF RECORD.

163-93

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 238.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

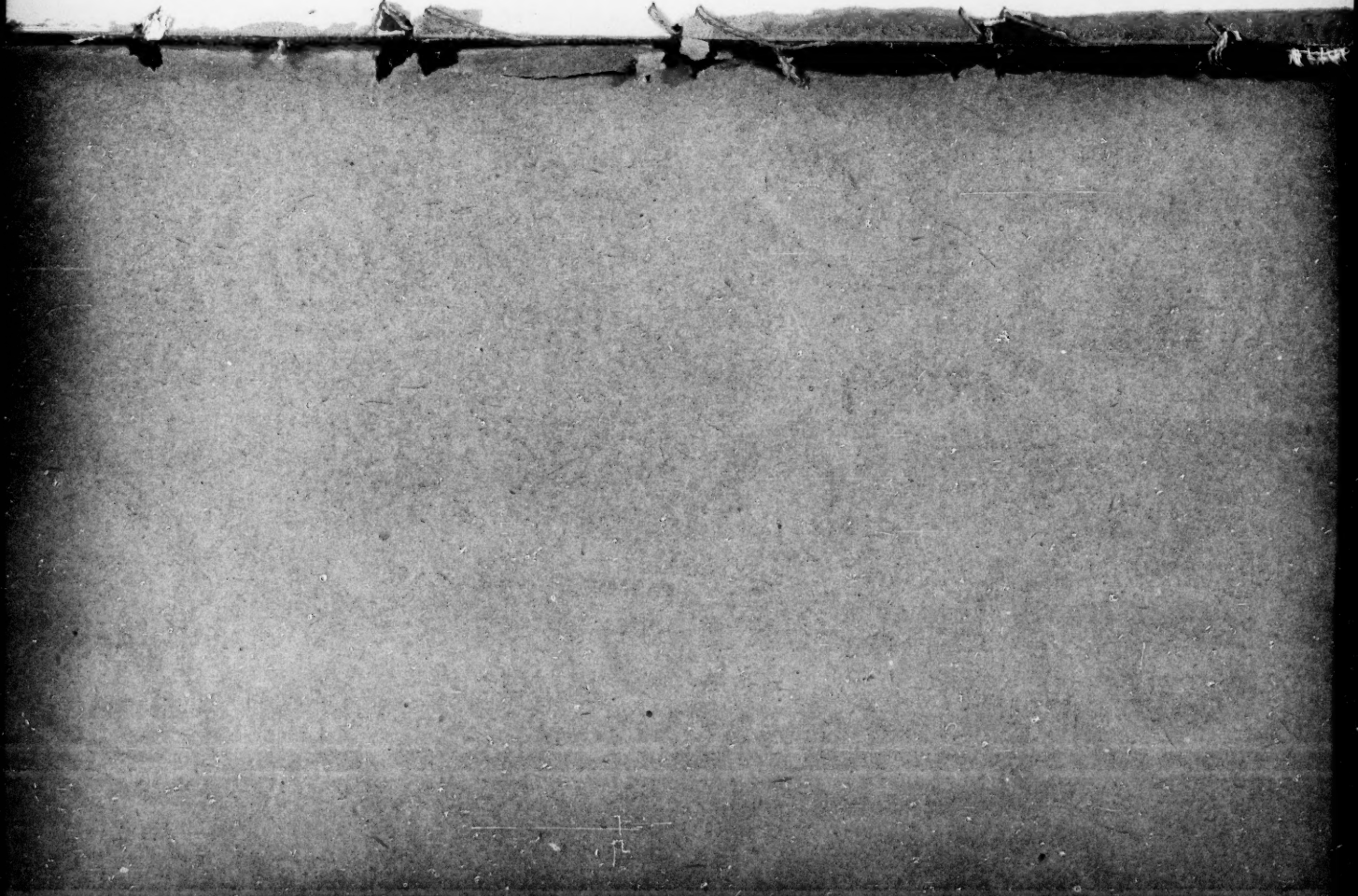
vs.

OLE J. EGELAND.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

FILED JUNE 9, 1893.

(15,329.)



(15,329.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 238.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OLE J. EGELAND.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from U. S. circuit court, district of Minnesota	2	1
Petition for writ of error	2	1
Writ of error and clerk's return	2	2
Assignment of errors in circuit court	3	3
Supersedeas bond	3	3
Citation (copy)	4	4
Caption	5	5
Complaint	5	5
Summons and marshal's return	8	7
Answer	9	8
Reply	10	9
Jury impaneled; trial, March 9, 1892	11	10
Trial, March 10, 1892	12	11
Verdict and judgment	13	12
Execution stayed	13	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 16, 1895.

	Original.	Print.
Petition for new trial	14	13
Petition for new trial denied	14	13
Bill of exceptions	15	14
Statement of plaintiff's testimony	15	14
defendant's testimony	18	17
Defendant's request for instructions	19	18
Charge to the jury	19	18
Defendant's exceptions to the charge	23	21
Certificate of judge to bill of exceptions	24	22
Clerk's certificate	24	22
Appearance for plaintiff in error	25	23
Original citation and admission of service	25	23
Appearance for defendant in error	26	24
Stipulation to correct bill of exceptions	27	24
Order to correct bill of exceptions	28	25
Order; cause argued and submitted	29	25
Opinion	31	26
Judgment	34	29
Præcipe for writ of error	34	29
Assignment of errors	35	30
Supersedeas bond on writ of error	37	31
Writ of error and clerk's return	40	32
Citation and admission of service	43	34
Certificate to transcript	45	34

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at a term thereof begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, it being the first day of May, A. D. 1893, before the Honorable Henry C. Caldwell and Walter H. Sanborn, circuit judges, and Honorable Amos M. Thayer, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the 31st day of October, A. D. 1892, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Minnesota, was filed in the clerk's office of the said circuit court of appeals in a cause wherein The Northern Pacific Railroad Company was plaintiff in error and Ole J. Egeland was defendant in error; which said transcript of record is in the words and figures following, to wit:

2 United States Circuit Court, District of Minnesota, Fourth Division.

OLE J. EGELAND, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the honorable judges of the United States circuit court of appeals for the eighth circuit:

Your petitioner, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled action, respectfully shows that by the judgment heretofore rendered by said United States circuit court for the district of Minnesota, fourth division, in the above-entitled cause a manifest error hath happened to the great damage of your petitioner in this: That a great manifest error of law occurred at the trial of said cause against the objection of your petitioner and to its great damage, all of which will more fully appear by the record of said court in said case.

Wherefore, your petitioner prays your honors to allow a writ of error from the United States circuit court of appeals for the eighth circuit, to be directed to said United States circuit court for the district of Minnesota, fourth division, whereby under seal of the said United States circuit court for the district of Minnesota, fourth division, the record and proceedings aforesaid, with all things concerning the same may be transmitted to the United States circuit court of appeals, eighth circuit, with said writ of error, and that the record and proceedings aforesaid, being duly inspected, the said United States circuit court of appeals, eighth circuit, will cause further to be done therein *and* correct that error, what of right, and

according to the laws and custom of the United States, should be done.

TILDEN R. SELMES,
Attorney for Petitioner.

Indorsed: "Filed Oct. 15, 1892. Oscar B. Hillis, clerk, by N. M. Carroll, deputy."

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the United States circuit court for the district of Minnesota, fourth division, Greeting:

Because, in the records and proceedings, as also in the ren-
2½ dition of the judgment of a plea which is in the said circuit court before you at the March term, 1892, thereof, between Ole J. Egeland, plaintiff, and The Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, Northern Pacific Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 14th day of December, 1892, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Seal of the U. S. Circuit Court, Dist. of Minnesota, Fourth Division.

Issued at office in Minneapolis, Minnesota, with the seal of the United States circuit court, dist. of Minnesota, and dated as aforesaid.

OSCAR B. HILLIS,
Clerk of U. S. Circuit Court, District of Minnesota.

Allowed by—

R. R. NELSON, *Judge.*

Original. United States circuit court of appeals, eighth circuit. N. P. R. R. Co., plaintiff in error, *vs.* Ole J. Egeland. Writ of error.

UNITED STATES OF AMERICA, }
District of Minnesota, Fourth Division, } *ss:*

In obedience to the command of the within writ I herewith transmit to the United States circuit court of appeals, a duly
3 certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the circuit court of the United States for the district of Minnesota, fourth division.

Seal of U.S. Circuit Court, Dist. of Minnesota, Fourth Division.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for District of Minnesota,
By N. M. CARROLL, *Deputy.*

United States Circuit Court, District of Minnesota, Fourth Division.

OLE J. EGELAND, Plaintiff, }
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Assignments of Error.

The defendant, The Northern Pacific Railroad Company, makes the following assignments of error:

First. The court erred in instructing the jury that, even in case the conductor of the work train ordered the plaintiff to jump off while the train was in motion, such order was evidence of negligence from which the jury might find that the defendant was guilty of negligence in this action.

Second. The court erred in instructing the jury that it was for the jury to determine whether the plaintiff was guilty of contributory negligence under all the facts and circumstances in the case in jumping from the train while the same was in motion and moving at the rate of from four to five miles per hour.

Dated October 7th, 1892.

JNO. C. BULLITT, JR.,
Defendant's Att'y, St. Paul, Minn.

Indorsed: "Filed Oct. 15, 1892. Oscar B. Hillis, clerk, by N. M. Carroll, deputy."

Know all men by these presents that we, The Northern Pacific Railroad Company, by Jno. C. Bullitt, Jr., its attorney, as principal, and The Saint Paul Title Insurance & Trust Company of Saint Paul, Minnesota, as surety, are held and firmly bound unto Ole J. Egeland in the full and just sum of five thousand dollars, to be paid to the said Ole J. Egeland, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we
4 bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this seventh day of October in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately at the March, 1892, term of the circuit court of the United States for the district of Minnesota, fourth division thereof, in a suit depending in said court between Ole J. Egeland, plaintiff, and The Northern Pacific Railroad Company, defendant, judgment was rendered against the said defendant railroad company, and the said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ole J. Egeland citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said defendant shall prosecute said writ of error to effect, and answer all damages and cost- if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By JNO. C. BULLITT, JR., *Attorney.*
ST. PAUL TITLE, INSURANCE & TRUST COMPANY,
By ROHEL R. DUNN, *Vice-President.*
JAMES W. JONES,
Assistant Secretary.

In presence of—
EDWIN IRLE.
HENRY L. DAVIS.
EDWIN IRLE.

Indorsed: "Filed Oct. 15, 1892. Oscar B. Hillis, clerk, by N. M. Carroll, deputy."

United States of America to Ole J. Egeland, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty day- from and after the date this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Minnesota, 4th division, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said
5 plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable R. R. Nelson, judge of the circuit court for the district of Minnesota aforesaid, this 15th day of October, A. D. 1892.

R. R. NELSON,
Judge of U. S. Circuit Court, Dist. of Minnesota.

Indorsed: "Filed Oct. 17, 1892. Oscar B. Hillis, clerk, by N. M. Carroll, deputy."

UNITED STATES OF AMERICA:

OLE J. EGELAND
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, for the March term of said court, held in the city of Minneapolis, in said district, in the year of our Lord one thousand eight hundred and ninety-two.

DISTRICT OF MINNESOTA, *ss*:

Be it remembered that on this 22d day of September, A. D. 1891, came the plaintiff above named, by his attorneys, Gjertsen & Rand, and filed in the clerk's office of said court his complaint, in the words and figures following, to wit:

United States Circuit Court for the District of the State of Minnesota, Fourth Division.

OLE J. EGELAND, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

Plaintiff, for his cause of action against the defendant, alleges:

That plaintiff was born in the Kingdom of Norway, and is and was during all the time hereinafter mentioned an alien, and a subject of the King of Norway and Sweden.

That the defendant is and was during all the time herein mentioned a corporation duly organized as provided by law, and engaged in the operation and maintenance of railroads and railways throughout the State of Minnesota and in other States of the Union, having its general office in the State of Minnesota.

That on the 13th day of September, 1890, the plaintiff was in the employ of the defendant as a section hand at Audubon, in the State of Minnesota, upon defendant's road; that as a part of the contract of hiring the defendant agreed to carry the plaintiff to and from his work upon defendant's road, as the occasion would require, in a safe and proper manner.

6 That on said day the defendant transported this plaintiff, together with other of its employés, from Lake Park to Hawley, Minn., on its work-train, operated over defendant's track, and plaintiff was set to work by the defendant at said last-mentioned place during the remainder of said day, and plaintiff continued to work until the evening of said day, when it was the duty of the defendant to safely transport plaintiff back to his home at Audubon.

That in the morning of said day the section crew of which plain-

tiff was a member had, pursuant to instructions of the defendant, left their hand cars and tools at Lake Park, Minn., and it was the duty of the plaintiff, under said contract of employment, together with the other members of said section crew, to stop over at Lake Park on the evening of said day and to take back said hand car and tools to Audubon in order to be prepared for the following day's work.

That immediately after completing the day's work at Hawley the defendant ordered and directed the plaintiff, together with other workmen, to board said work-train for Lake Park, and thereupon defendant transported plaintiff towards said latter place. That it was the duty of the defendant to stop its said work-train at Lake Park in order to enable plaintiff and the other members of said section crew to alight from said train and take said hand car, together with the tools, back to Audubon on that evening. That yet the defendant, not regarding its duty in that behalf, conducted itself so carelessly, negligently and unskillfully, that in coming to said station known as Lake Park, the defendant wholly failed and neglected to stop its said train, but simply slacked up the speed thereof, and the conductor of said work-train, who was then and there the vice-principal and representative of said defendant, and in sole and exclusive charge thereof, and who directed the movements of said train, and the manner in which plaintiff and the other workmen upon said train were to get off of same, ordered and directed this plaintiff, together with the other members of said section crew, to jump off said train while the same was in motion and going at the rate of speed of not more than seven miles per hour, and passing said station known as Lake Park, as aforesaid. That under the contract of employment with the defendant, it was the duty of this plaintiff to obey the order of said conductor, and it was also the duty of the plaintiff to get off said train at said Lake Park station in order to take back the said hand car to Audubon.

That the plaintiff was then and there ignorant of the danger and hazard to which he was exposed by said command of the defendant as aforesaid, and without any fault or negligence on his part
7 whatsoever, and relying upon the superior knowledge, skill and experience of the defendant, and upon defendant's command and order, did then and there obey the said command and order of said defendant and did jump from said train while the same was in motion, as aforesaid, in a careful and prudent manner, and in jumping from said train the plaintiff, through the carelessness, negligence, and default of the said defendant and its vice-principal, was violently thrown down upon the platform in front of said station of said defendant, whereby the said plaintiff was greatly cut, bruised, and wounded, and whereby plaintiff had his leg broken and fractured, so that plaintiff became and was sick and unable to work for a long time.

That by reason of the aforesaid carelessness, negligence, and unskillfulness, omissions and commissions on the part of the defendant, plaintiff was injured as aforesaid, and has endured great bodily and mental pain, and has for a long time remained ill, and was for a

long time prevented from pursuing his business, and will, for the remainder of his natural life, by reason of said injury, suffer great pain, and be prevented from pursuing his business as he was able to before said injury, all to his damages in the sum of five thousand ($5,000.00) dollars.

Wherefore plaintiff demands judgment against the defendant for the sum of five thousand ($5,000.00) dollars, together with his costs and disbursements of this suit.

Dated August 22nd, 1891.

GJERTSEN & RAND,
Attorneys for Plaintiff.

STATE OF MINNESOTA, }
County of Hennepin. }

Henry J. Gjertsen came before me, and being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the foregoing action; that he knows the contents of the foregoing complaint, and that the same is true to the best of his knowledge, information and belief. That the reason that this verification is made by affiant and not by plaintiff is that plaintiff is out of the county wherein resides this affiant.

HENRY J. GJERTSEN.

Subscribed and sworn to before me this 22 day of Sept., 1891.
[SEAL.] CARL F. J. GOEBEL,
Notary Public, Hennepin County, Minn.

Indorsed: "Filed Sept. 22, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy."

And on the same day the following summons was issued; the same was returned by the marshal and filed of record in said cause on the 26th day of September, A. D. 1891.

8 UNITED STATES OF AMERICA, }
District of Minnesota, Fourth Division, } *ss:*

Summons.

In the Circuit Court of the United States for the District of Minnesota.

OLE J. EGELAND, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The President of the United States of America to the defendant above-named, Greeting:

You are hereby summoned and required to answer the complaint in this action which has been filed in the office of the clerk of this court in Minneapolis, county of Hennepin and State of Minnesota, and file your answer in said clerk's office within twenty days after

the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will have the amount he is entitled to recover ascertained by the court or under its direction, and take judgment for the amount so ascertained, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 22nd [SEAL.] day of September, A. D. 1891.

Issued at my office in the city of Minneapolis, under the seal of said circuit court, the day and year last aforesaid.

OSCAR B. HILLIS, *Clerk*,
By C. C. WEBSTER, *Deputy*.
GJERSTEN & RAND,
Plaintiff's Attorneys.

Indorsed: "Filed Sept. 26, A. D. 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy."

DISTRICT OF MINNESOTA, *ss*:

I hereby certify and return that on the 23rd day of September, 1891, at the city of St. Paul in said district, *that* I served the annexed summons upon the therein-named defendant railroad company by leaving a true copy thereof with one Krim, the private secre-
9 tary of W. S. Mellen, gen'l manager of said railroad company, and acceptance of service by him is indorsed on summons.

J. C. DONAHOWER,
U. S. Marshal,
By A. B. BRACKETT,
Deputy U. S. M.

And on October 16, 1891, the following answer was filed of record in said cause, viz:

Answer.

United States Circuit Court, District of Minnesota, Fourth Division.

OLE J. EGELAND, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Defendant answering the complaint of the plaintiff herein admits that the plaintiff is an alien as alleged in said complaint; defendant also admits that it is a corporation organized and existing under the laws of the United States and engaged in the operation of a railroad substantially as alleged in said complaint; defendant also admits that on the 13th day of September, 1890, plaintiff was in its employ, and also admits that on or about said day plaintiff received some injuries, but denies that it has any knowledge or information sufficient to form a belief as to the character, nature or extent of said

injuries. Defendant further answering the complaint of the plaintiff herein denies each and every allegation in said complaint contained and every part thereof, except as hereinbefore expressly admitted, qualified or denied, and denies specifically that by reason of any of the matters or things in said complaint mentioned the plaintiff has been damaged in the sum of five thousand dollars, or in any other sum whatsoever. For further answer in this behalf defendant alleges and states that the injuries, if any, received by the plaintiff were caused solely by his own carelessness and negligence, and not otherwise.

Wherefore defendant prays that it may be hence dismissed and for its costs and disbursements herein.

Dated October 15th, 1891.

JNO. C. BULLITT, JR., AND
TILDEN R. SELMES,
Attorneys for Defendant.

10 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Tilden R. Selmes, being duly sworn, says that he is an officer, to wit, assistant counsel, of the defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

TILDEN R. SELMES.

Subscribed and sworn to before me this 15th day of October, A. D. 1891.

[SEAL.] EDWIN IRLE,
Notary Public, Ramsey County, Minn.

Indorsed: "Filed Oct. 16, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy."

And on October 28, 1891, the following reply was filed of record in said cause, viz:

Reply.

United States Circuit Court for the District of the State of Minnesota, Fourth Division.

OLE J. EGELAND, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

Plaintiff, replying to the answer of the defendant, specifically denies each and every allegation, matter and thing in said answer contained and alleged.

Wherefore plaintiff demands judgment as prayed for in the *the* complaint.

GJERTSEN & RAND,
Attorneys for Plaintiff.

Dated October 20, 1891.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Henry J. Gjertsen came before me personally, and being duly sworn doth say that he is one of the attorneys for plaintiff in the above-entitled action; that the foregoing reply is true to the best of his knowledge, information and belief; that this verifi-
11 cation is made by affiant because plaintiff is absent from the county of Hennepin, where resides affiant.

HENRY J. GJERTSEN.

Subscribed and sworn to before me on this 21 day of Oct., A. D. 1891.

[SEAL.] CARL F. J. GOEBEL,
Notary Public, Hennepin County, Minn.

Indorsed: "Filed Oct. 28, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy."

And on March 9, 1892, the following proceedings of court were entered in said cause, viz:

United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1892.

OLE J. EGELAND
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

MARCH 9, 1892.

This day come the parties in the above-entitled cause, the plaintiff by his attorneys, Gjertsen & Rand, and the defendant by its attorney, John C. Bullett, Jr.

Thereupon upon motion of plaintiff's attorneys it is ordered that a jury come, to wit, H. G. Young, J. T. Morris, N. H. Nelson, W. L. Mallery, Thomas McDermott, H. J. Essler, L. Maish, C. A. Passavant, J. W. Oyen, Abram Wiltse, George Chrystler, J. W. Brigham, twelve good and lawful men, who were duly sworn to try the issues joined herein, and the trial of the same is proceeded with as follows:

Henry J. Gjertsen opens the case for plaintiff.

Ole J. Egeland is sworn and examined in his own behalf.

His examination not being concluded, the court takes a recess until two o'clock.

Court convenes at two o'clock.

Ole J. Egeland is recalled and further examined in his own behalf.

Charles Lind is sworn and examined on behalf of plaintiff.

Ole Morck " " " "

Andrew Friedland is sworn and examined on behalf of plaintiff, through Olaf Lindstrom as interpreter.

Christ Borreson is sworn and examined on behalf of plaintiff.

Whereupon plaintiff rests his case, reserving the right to call Dr. Norred.

12 Defendant's counsel moves the court to instruct the jury to find and return into court a verdict for the defendant and against the plaintiff.

The argument of said motion not being concluded at the hour of adjournment, it is by the court ordered that further proceedings herein be and the same are hereby postponed until tomorrow morning at ten o'clock.

And on March 10, 1892, the following proceedings of court were entered in said cause, viz:

United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1892.

OLE J. EGELAND
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

MARCH 10, 1892.

This day again come the parties herein, by their respective attorneys; also the jury sworn to try this cause, and the further trial of the same is proceeded with as follows:

The motion of defendant's counsel that the court instruct the jury to find and return into court a verdict for the defendant having been duly submitted, and the court being fully advised concerning the same, now, after due consideration thereof, it is by the court ordered that said motion be-and the same is hereby denied, with leave *of* defendant's counsel to renew the same at the close of the testimony.

Thereupon the further trial of the same is proceeded with as follows:

John C. Bullitt, Jr., opens the case for defendant.

R. C. Potter is sworn and examined on behalf of defendant.

Dr. Chas. H. Norved is sworn and examined on behalf of plaintiff.

G. H. Scougla is sworn and examined on behalf of defendant.

Charles Martin " " " "

S. A. Coulter " " " "

F. W. Dunlap " " " "

A. P. Stowell " " " "

And here defendant rests his case.

Charles Lind is recalled and examined on behalf of plaintiff.
Ole J. Egeland " " " "
Ole Morcke " " " "

And here the plaintiff again rests his case.

The motion of defendant's counsel, that the court instruct the jury to find and return into court a verdict for the defendant, being again renewed, and the same being fully argued and submitted, and the court being fully advised concerning the same, it is by the court ordered that the same be overruled and denied.

13 Whereupon John C. Bullitt, Jr., sums up the case for the defendant.

Henry J. Gjertsen sums up the case for the plaintiff.

The court instructs the jury.

An officer is sworn to take charge of the jury, and they retire to consider of their verdict, with the instruction that if they agree upon a verdict before the incoming of the court tomorrow morning, they shall place the same under seal and return it into court by their foreman.

And on March 11, 1892, the following proceedings of court were entered in said cause, viz:

United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1892.

OLE J. EGELAND
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

MARCH 11, 1892.

The jury sworn to try this cause having heretofore retired to consider of their verdict, come now and find and return into court by their foreman their verdict in words and figures following:

"We, the jury in the above-entitled cause, find for the plaintiff, and assess his damages at the sum of two thousand and twenty-five dollars ($2,025.00).

J. W. BRIGHAM, *Foreman.*"

It is therefore considered, ordered and adjudged by the court that the plaintiff, Ole J. Egeland, do have and recover from the defendant, The Northern Pacific Railroad Company, the aforesaid sum of two thousand and twenty-five dollars ($2,025) so found to be due by the jury, together with his costs and disbursements of this action to be taxed, and that he have execution therefor.

And on March 14, 1892, the following proceedings of court were entered in said cause, viz:

United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1892.

OLE J. EGELAND
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

MARCH 14, 1892.

Upon the motion of Tilden R. Selmes, Esq., attorney for defendant, it is by the court ordered that execution upon the judgment entered in this cause on March 11th, 1892, be and the same
14 hereby is stayed for the period of forty-two days from and after the entry thereof for the purpose of preparing and presenting a motion for a new trial to be filed herein.

And on March 21, 1892, the following petition for a new trial was filed of record in said cause, viz:

Petition for New Trial.

United States Circuit Court, District of Minnesota.

OLE J. EGELAND, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The above-named defendant petitions said court to set aside and vacate the verdict in this cause upon the following grounds, viz: Errors of law committed at the trial of said cause and duly excepted to by said defendant, and because said verdict is not justified by the evidence and is contrary to law.

Dated March 21, 1892.

JNO. C. BULLITT, JR.,
Att'y for Def't and Petitioner.

Indorsed: "Filed March 21, 1892. Oscar B. Hillis, clerk, by G. F. Hitchcock, Jr., deputy."

And on September 6, 1892, the following proceedings of court were had in said case, viz:

United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1892.

OLE J. EGELAND
vs.
N. P. R. R. Co.

SEPTEMBER 6, 1892.

This day come the parties herein, by their respective attorneys, and defendant's motion to set aside the verdict rendered herein, to

vacate the judgment entered thereon and for a new trial of said cause coming on to be heard, the same is fully argued by said attorneys, duly submitted, and after due consideration thereof, and the court being fully advised in the premises, it is ordered that said motion be and the same hereby is denied.

Upon motion of John C. Bullitt, Jr., attorney for the defendant, it is by the court ordered that execution upon the judgment heretofore entered in this cause be and the same hereby is stayed until a bill of exceptions is settled and signed.

And on October 15, 1892, the following bill of exceptions was filed in said cause, viz:

15 *Bill of Exceptions.*

United States Circuit Court for the District of Minnesota, Fourth Division.

OLE J. EGELAND, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD CO., Defendant.

This action came on for trial before Hon. R. R. Nelson, judge of said court, at the regular term of the United States court, in and for said district, and a jury duly impaneled therein, on the 9th of March, 1892, at Minneapolis, Minnesota; Henry J. Gjertsen and Lars M. Rand appearing for the plaintiff, and John C. Bullitt, Jr., appearing for the defendant, and thereupon the following proceedings were had: The jury having been duly sworn and impaneled, the case on the part of the plaintiff was opened by Mr. Gjertsen, and thereupon to sustain the issues on his part the plaintiff, Ole J. Egeland, introduced evidence tending to show that he resided at Audubon, Becker county, Minnesota, and that during the summer of 1890, for about two months prior to receiving the injury complained of, he was in the employ of the defendant as a section man, working on defendant's line of railway between Audubon and Lake Park.

That Lake Park is west of Audubon, and there were six or seven men working with him in the section crew, and that Ole Marke was the foreman of the section crew.

That on September 13th, 1890, the section crew, as usual, including the plaintiff, left Audubon on a hand car for the purpose of working on the section of railway between Audubon and Lake Park; that this was the usual method whereby the section crew went to their work; that on the day in question plaintiff and the others of the section crew worked on the line of railway between Audubon and Lake Park, and while engaged in this work the work-train of the defendant, in charge of a conductor and the roadmaster, came in the morning from the east, proceeding west, and took the section crew to Hawley, west of Lake Park, in order to do some work necessary to be done at that point; that the hand car and tools of

the section crew were left at Lake Park, and that after completing the work at Hawley the section crew, including the plaintiff, was taken on board the work-train and proceeded eastwards towards Lake Park; that it was necessary for the section crew in which plaintiff worked to get off at Lake Park in order to get the hand car and tools and convey it to Audubon for the purpose of next day's work; that R. G. Potter was the conductor of the work-train in the employ of the defendant company, and had the control of all the men, including the plaintiff, from the time they boarded the work-train in the morning until they left the train in the evening,
16 and the conductor during the day directed the men, including the plaintiff, what to do. The conductor also controlled the movements of the train and gave all orders with reference to starting and stopping the same; that the work-train consisted of several flat cars and caboose, and the section crew, including the plaintiff, when they left Hawley and proceeded to Lake Park, sat down in the caboose; that as the work-train approached Lake Park in the evening, Ole Marke, foreman of plaintiff's section crew, called out to his men to get ready to get off the train at Lake Park; that the train slacked up as it approached said Lake Park station; that commencing at the westward at Lake Park there is a warehouse, and then further east the station and depot building; that the platform at the station runs down to and opposite this warehouse; that while the train was still in motion, Ole Marke, foreman, dropped off and landed on the platform opposite the warehouse; that the other section men, including the plaintiff, hurried to the front platform of the caboose, following Marke as quickly as they could; that plaintiff was the last man of the crew proceeding out to the front of the platform of the caboose, and the plaintiff waited for the train to stop so that he could get off; when the plaintiff got to the door of the caboose near the front platform he met the conductor of the train, and the conductor said to him "Get off, fellow;" that plaintiff had a tin dinner pail in one hand and a shovel in the other, and that while plaintiff stood upon the front platform of the caboose waiting for the train to stop, the conductor again said, "Hurry up, jump off now;" that the train at this time was moving at the rate of from four to five miles per hour; that plaintiff threw his dinner pail and shovel down upon the platform, obeying the order of the conductor in order to get in a careful position, and then he jumped in the same direction as the moving train, but when he struck the platform for some reason he fell and thereby received the injuries complained of; that at the time plaintiff jumped from the train the same was moving at the rate of about four miles per hour; that from the time Marke spoke to the section crew telling them to get ready to get off up to the time plaintiff jumped from the train was about five minutes, and that from the time the conductor first ordered the plaintiff to jump off, and the time the order was obeyed, was about two or three seconds; that the platform at the place where plaintiff jumped from the train came to about twelve or sixteen inches below the lower step of the caboose; that the train after plaintiff got off did not stop, but increased its speed and continued

on its way to Audubon, where it slacked up its speed in the same manner as it had at Lake Park to let off some of the workmen, and then it continued its way to Staples; that the platform upon
17 which plaintiff jumped was in a good condition and there were no obstructions of any kind lying upon it at the place where plaintiff jumped.

The plaintiff further testified in his own behalf that if the conductor had not ordered him to get off he would have stayed on board the train until the train had stopped at some place; that he relied upon the order of the conductor and did not think there was any danger in obeying the same; that he saw three men jump off safely before he did, and that he went upon the order given him.

The plaintiff on cross-examination testified that he did not know the name of the conductor, and had never seen the conductor before that day, and that when he went out on the platform he saw a man standing at the brake of the caboose setting the same, and when he reached the platform this man said to him, "Get off, fellow;" that he supposed this man was the conductor of the train; that plaintiff did not know of his own knowledge whether he was the conductor or not.

On cross-examination plaintiff, Ole J. Egeland, also testified as follows:

Q. Why was it you were particular to get off with your face towards the engine?

A. I did not want to fall.

Q. You say you turned your face towards the engine to keep from falling?

A. Yes, sir; I turned my face in order to get a good position and then I jumped this way in the same direction as the moving train.

Q. You knew that it was a great deal easier to get off facing that way, in the way the train was going, than it was to get off any other way?

A. That was the way men used to do when they jumped from the train; they jumped the same way the train was moving.

Q. With their faces the way the train was moving?

A. Yes, sir.

Q. It is pretty difficult to get off the train if it is moving if you step off with your face towards the rear of the train? You might be apt to tumble down if you did that?

A. I don't know; I did not do that. If they have practice they can do that, but I can't.

Q. You did that because you knew it was the safest and best way to get off?

A. Yes; that is the way the men used to do it.

The plaintiff also testified that he had had no experience in getting off moving trains, and that this was the first time he had ever attempted to do so.

During the examination of the plaintiff the court asked the witness, Ole J. Egeland, this question:

"What did you mean when you said you did not know that you would have jumped if you had not been ordered, and that you relied upon the order;" to which question the witness answered:

A. "I meant that if my foreman had stayed on board I would have stayed too. If I had not been ordered I would have stayed on the train until it stopped at some place."

The plaintiff further testified that he followed the foreman just as quickly as he could, because he wanted to get off as quick as possible after the foreman had left the caboose.

Whereupon the defendant to sustain the issues on his part introduced evidence tending to show that when the work-train left Hawley and proceeded eastward there were two gangs of section men in the caboose, one gang belonging to Lake Park and the other at Audubon, both of which were to be left off at Lake Park; that the train approached Lake Park at the rate of speed of about twenty-five miles an hour, and as the train approached Lake Park the conductor was sitting in the cupola of the caboose, and in this position he could see the engineer; that he gave the engineer a signal to stop; that the Lake Park crew passed out at the rear end of the caboose and dropped off the moving train before it reached the platform at Lake Park; that the engineer applied the brakes and slacked up the speed of the train so that when the caboose reached the west end of the platform it was running at a rate of about five miles an hour; that the section gang of which plaintiff was a member crowded out on the platform and began to drop off one after the other; that the conductor notified the section crew of which plaintiff was a member that he would stop at Lake Park in order to let them off; that this notice was given them when the train was at Winnipeg Junction, a station west of Lake Park; that the conductor instructed a brakeman, Charles Martin, to go out and set the brakes in order to stop the train at Lake Park; that Martin went out of the train and proceeded to set the brakes for this purpose; that when the conductor gave the signal to the engineer to stop the train said engineer shut off the steam and the train began to slow down; that at this time the conductor was sitting in the cupola of the caboose; that the Lake Park crew got off before the train came to a stop, and he hallooed "All right;" that the conductor supposed from this that both crews had gotten off and had thereupon given the signal to the engineer to go ahead and the engineer began to increase the speed of the train, and the brakeman, Martin, began to let off the brakes; that the conductor happened to look down at the front platform of the caboose and saw the Audubon crew, including the plaintiff, in the act of getting off, and thereupon the conductor signaled the engineer to stop, and after climbing down from the caboose went to the east end of the caboose to set the brake; and that as the conductor went out on the platform there were several men standing there, including the plaintiff; that the

conductor said to the men, "Don't hurry, I will let you off," and then set the brakes on the caboose; that in the meantime the men began to get off; that the plaintiff was the last man to get off, and that the train had not come to a full stop when the plaintiff got off, and was running at the rate of about four miles per hour.

G. H. SCOUGALE, roadmaster in the employ of the defendant, was sworn and testified in its behalf that at the time the plaintiff got off the train at Lake Park the train was moving about as fast as a man could walk, and that he thought a man could walk something like four miles an hour.

At the close of the testimony the counsel for the defendant asked the court to instruct the jury to find a verdict for the defendant on the ground

"First. That there is no negligence shown on the part of the defendant which would entitle the plaintiff to recover a verdict against the defendant.

Second. That even if there should be any negligence shown on the part of the defendant, yet the plaintiff was guilty of such contributory negligence that he could not recover in this action," which requests were refused by the court, and the defendant thereupon duly excepted and exceptions duly noted and allowed; whereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY: I shall instruct you upon the law applicable to the facts in this case. The plaintiff seeks to recover damages from the defendant for a personal injury sustained, as he claims, entirely by the negligence of the defendant.

It seems that the plaintiff, on the evening of September 13th, 1890, when he was injured, was a section man working for the defendant company between Audubon and Lake Park. He was picked up and carried with other section gangs in the morning to Hawley, to work under the control and charge of Mr. Potter, the conductor of the work-train. Potter had instructions to carry all gangs back in the evening to the points where he picked them up, and stop his train and let them off. It is in substance claimed by the plaintiff, that on the return of the work-train in the evening it slacked up to a speed of about four or five miles an hour as they were passing Lake Park station, and that when running at that rate of speed the conductor, Potter, commanded and directed plaintiff to jump from the moving train, and as he was preparing to obey the order as they were passing the platform of the depot he told him to "hurry up and jump off," or words to that effect; that in obedience thereto he jumped, as he claims, with his face towards the direction in which the train was moving and fell and sustained the injury of which he complains.

Now, the boss of the work-train was not Ole Marke, the section foreman, he was merely the boss or foreman of the gang, and he had nothing to do with the running of the train or with any commands or orders that were given with respect to it, and I charge you that any order or direction given to the plaintiff by Ole Marke,

the section foreman, in respect to getting off the train at Lake Park, has no bearing whatever upon the issues in this case and must not be considered by you. The testimony of the superintendent is plain upon that point, that Mr. Potter was in charge of these men, and that he had orders to pick them up and carry them on the work-train to Hawley, and then they were to be brought back to the points from which they had been taken in the morning, so that this crew was to be taken back to Lake Park.

Plaintiff claims, that at the speed the train was going, it would appear to a man of ordinary prudence and intelligence in his situation that he could jump with safety, and that in obedience to Potter's direction, which it is claimed he had a right to rely upon, he jumped off, using due care in jumping off, but fell as he reached the platform and was injured. This is briefly the substance of the evidence to sustain the plaintiff's case.

The defendant denies that all the facts are true, as disclosed by the testimony for the plaintiff, and denies that by any direction of Potter plaintiff jumped off the train. Defendant claims that the train had been signaled to stop and had slacked up and the brakes were being set and the train was about to stop to let plaintiff and others get off, and that plaintiff knew it, and that the conductor, Potter, in the caboose told them all in plaintiff's gang who were to be left at Lake Park: "Boys, don't be in a hurry, I will let you off," but that they jumped off voluntarily before the train stopped, plaintiff being the last to get off, and that before he jumped and while he was preparing to get off, Potter told plaintiff: "Don't hurry, I will let you off," but that plaintiff jumped before the train had come to a stop, when it was running from two to four miles an hour. These are briefly the most important facts testified to. The questions for you to consider are:

First. Was the plaintiff's injury occasioned entirely by the negligence or improper conduct of the defendant company; and

21 Second. Did the plaintiff so far contribute to his injury by his own negligence or want of ordinary care that but for such negligence or want of care and caution the injury would not have happened?

Potter, the conductor, was the representative of the company, and if he was negligent, and his negligence was the proximate cause of the injury, the defendant is liable therefor. So that you must determine in considering the first proposition whether there was any negligence on his part. if there was none, then that is an end of the case; if he did not give the command and direction to jump off, but had signaled the engineer to stop the train and all the brakemen were taking steps so to do, and the plaintiff voluntarily jumped off, he clearly was not guilty of negligence, and your verdict should be for the defendant. The evidence is undisputed that signals were given to stop and the brakemen were setting the brakes and the engineer was taking the usual steps to operate his engine to stop, and all the hands, including the conductor, were at work to secure this stopping of the train, and all these men were

making efforts to stop the train in obedience to the signal given by Potter, the conductor.

Now, gentlemen, is it reasonable to believe that the conductor, having stopped to pick the men up at Lake Park, and knowing that he must stop to put them off, should order or command or direct the plaintiff to jump off and take the risk of breaking his neck, or injuring himself by jumping off a train running at the rate of four miles an hour or thereabouts. That is a question you must determine before you can say by your verdict that the defendant is guilty of negligence which caused this plaintiff's injury. If you find from all the evidence that the defendant, through the conductor, Potter, was negligent, then you must determine before the plaintiff can recover whether the defense is sustained. The burden of proof is upon the plaintiff to satisfy you by a preponderance of evidence that the defendant was negligent, and he must do so before he can recover a verdict at your hands. But when it comes to the question of contributory negligence, then the burden of proof shifts, and it is necessary for the defendant to satisfy you by a preponderance of evidence that the plaintiff contributed to his own injury.

It is a rule of law that where a person who is injured through the negligence of another contributes to this injury by his own negligence, so that but for such concurring or contributory fault the injury would not have happened, such person cannot recover for an injury sustained, and that presents the second proposition which I have already presented to you, which is, "Did the plaintiff so far
contribute to his injury by his own negligence or want of
22 care, that but for such negligence or want of care and caution
the injury would not have happened?"

Again, I instruct you that to jump off a railroad train moving at a rate of speed of four or five miles an hour is presumably a negligent act *per se*, and that in order to rebut this presumption of negligence and recover for an injury sustained from so jumping, the plaintiff must satisfy you that he was ordered and directed to do so by the conductor, Potter, and he must do that by a preponderance of evidence. Plaintiff admits the jumping, and he attempts to excuse the act, and in order to do that he must satisfy you that Potter ordered and directed him so to do, and also that the order was calculated to divert his attention from the danger of jumping, or that the order created a situation which interfered with his free agency to some extent, and such order created a confidence that the attempt could be made with safety.

It is true that in a contract between employer and employé it is presumed that the employer will not unnecessarily expose the employé to danger in the course of his employment; the employé has a right to expect that all reasonable precautions will be taken to assure his safety, but at the same time it is also the duty of the employé to exercise care to protect himself, and because he has entered into a contract of employment he cannot recklessly run into danger and expose himself unnecessarily to risks and hazards. An employer does not absolutely insure the safety of an employé. All he does is to contract that in all cases he will exer-

cise ordinary care and caution not to expose the employé to dangers which he could have anticipated which did not exist at the time of the employment. In other words, the employer agrees that he will exercise all reasonable care and caution to provide for the safety of his employés, and the employé also impliedly agrees that he will exercise reasonable care to protect himself.

If the danger to be met by jumping was manifestly great, if it was obviously dangerous, so that an ordinar-y prudent person in the same situation would not have jumped, then it was contributory negligence to obey the direction of the conductor, if the same was given. But if the danger was not so great under the circumstances but that the plaintiff might reasonably believe that he could obey it by taking proper care, particularly as his superior commanded it, and if his purpose was to obey in pursuance of his sense of duty, and without waiting to think or consider the risk and danger he jumped, then it would not be contributory negligence to obey and jump. So the question that presents itself for your determination is, whether under all the circumstances of the case, if you should come to the determination that this instruction or
23 command was given by Potter to jump when the train was running at the speed testified, whether the plaintiff under those circumstances had the right to rely upon the order, whether he was justified in reasonably believing that he could make the attempt with safety. If the order was not given and he voluntar-y jumped off the train seeing that the others had done so in safety, and he thought he could do the same, then he took the risk; and if in consequence of so jumping he was injured he could not recover because it would be contributory negligence on his part. On the other hand, if the company was negligent and brought this injury upon the plaintiff entirely by its negligence and without any fault on his part, if you find that from the evidence, then the question would be what compensation shall he have for the injuries he has sustained, or what amount will remunerate him for the injury he has suffered. If he is entitled to recover at all, he is entitled to recover compensation for pain and suffering whatever that may be, according to the evidence introduced here, as you may find it. He is also entitled to recover damages for any temporary ailment caused by this injury, and that is a matter left to the sound discretion of the jury.

The court cannot enlighten you upon that subject; you have heard the testimony and you can give what, in your judgment, you think will compensate him for the injury sustained, if you think he is entitled to recover anything. And the same is true with regard to any pain or suffering or disability which you think he may suffer in the future as the result of this accident.

I have several requests presented to me; I refuse to give any of them, except as I have given them in the general charge.

You can take the case, gentlemen, weigh all the evidence carefully and bring in a verdict accordingly.

Defendant by its counsel excepted to that portion of the charge

wherein the court instructs the jury that if Potter, the conductor, ordered the plaintiff to jump from the train while it was running at a rate of speed testified to, that that was an act of negligence, and defendant's counsel called the attention of the court to the fact that that was a question for the jury, whether such act was negligence or not.

The defendant's counsel also excepted to that portion of the charge wherein the court instructed the jury to the effect that if this order was given and the plaintiff reasonably believed that he could jump with safety from the train, then that was not contributory negligence, and the defendant's counsel asked the court to charge the jury that if the order was given, and plaintiff might reasonably believe
that he could jump with safety from the train, that inversely
24 the person who gave the order might also reasonably believe
that the plaintiff could jump from the train with safety.

The COURT: I decline to give that in those words. What I have said in my charge to the jury must be taken in connection with the other portion of the charge. The presumption of negligence from jumping must be overcome, and I have stated to the jury how it must be overcome, and that they must be satisfied of that by a preponderence of the evidence in order to overcome the presumption of negligence.

Whereupon the jury retired and returned a verdict for the plaintiff in the sum of $2,025.

Forasmuch as the foregoing matters do not appear of record in this cause the foregoing bill of exceptions is hereby settled, allowed, and ordered to be made a part of the record in said case, this 14th day of October, 1892.

[SEAL.]

R. R. NELSON,
Judge of said Court.

It is hereby stipulated that the foregoing bill of exceptions is satisfactory, and may be settled and allowed.

GJERTSEN & RAND,
Att'ys for Plaintiff.
TILDEN R. SELMES,
Att'y for Defendant.

Indorsed: "Filed Oct. 15, 1892. Oscar B. Hillis, clerk, by N. M. Carroll, deputy."

UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Fourth Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable, the United States circuit court of appeals for the eighth circuit, that the foregoing, consisting of 52 pages, numbered consectively from 1 to 52 inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause and of the whole

thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging the original citation, together with the proof of service thereof.

Seal of the U. S. Circuit Court, Dist. of Minnesota, Fourth Division.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Minneapolis, in the district of Minnesota, this 27th day of October, A. D. 1892.

OSCAR B. HILLIS, *Clerk*,
By N. M. CARROLL, *Deputy*.

Filed Oct. 31, 1892. John D. Jordan, clerk.

25 And on the 14th day of November, A. D. 1892, an appearance of counsel for plaintiff in error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error. } No. 206.

The clerk will enter my appearance as counsel for the plaintiff in error.

(Signed) TILDEN R. SELMES.

Endorsed: U. S. circuit court of appeals, eighth circuit, October term, 1891. No. 206. Northern Pacific R'y Co., plaintiff in error, *vs.* Ole J. Egeland. Appearance. Filed Nov. 14, 1892. John D. Jordan, clerk. Tilden R. Selmes, St. Paul, Minn., counsel for pl'ff in error.

And on the 18th day of November, A. D. 1892, an original citation was filed in said cause in the words and figures following, to wit:

United States of America to Ole J. Egeland, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Min-
26 nesota, 4th division, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable R. R. Nelson, judge of the circuit court for the district of Minnesota aforesaid, this 15th day of October, A. D. 1892.

(Signed) R. R. NELSON,
Judge of U. S. Circuit Court, Dist. of Minn.

Endorsed: Original. United States circuit court of appeals, eighth circuit. N. P. R. R. Co., plaintiff in error, *vs.* Ole J. Egeland. Citation. Service of a copy of within citation is hereby admitted this 15th day of September, 1892. Gjertsen & Rand, att'ys for def't in error, Minneapolis, Minnesota. Filed Oct. 17. Oscar B. Hillis, clerk; N. M. Carroll, deputy. Filed Nov. 18, 1892. John D. Jordan, clerk.

And on the 10th day of December, A. D. 1892, an appearance of counsel for defendant in error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

NORTHERN PACIFIC R. R. Co., Plaintiff in Error,
vs.
OLE J. EGELAND. } No. 206.

27 The clerk will enter my appearance as counsel for the defendant in error.

HENRY J. GJERTSEN.
LARS M. RAND.

Endorsed: U. S. circuit court of appeals, eighth circuit, 1892, December term. No. 206. Northern Pac. R. R. Co. *vs.* Ole J. Egeland. Appearance. Filed Dec. 10, 1892. John D. Jordan, clerk. Henry J. Gjertsen, Lars M. Rand, counselors for def't in error.

And on the third day of February, A. D. 1893, a stipulation and order correcting record were filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

THE NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error. } No. 206.

In the above-entitled action it is hereby stipulated and agreed by and between the plaintiff in error and the defendant in error that the record and the transcript of the record, as the same is returned to said court and as printed in said cause, may be amended and corrected by striking out the words in lines nineteen and twenty of folio fifty, on page 24 of the printed record thereof, as follows: "Con-

taining all the evidence," being that part of the certificate of the trial judge to the bill of exceptions settled and allowed in said cause on the 14th day of October, 1892, appearing upon page
28 24 of said printed record, wherein the said words "containing all the evidence" are used by the trial judge,

It being further stipulated and agreed that said words "containing all the evidence" in said judge's certificate to said bill of exceptions *was* inadvertently inserted and interlined therein and *was* not intended to be a part of said certificate.

It is also agreed that the bill of exceptions contains all the evidence bearing upon the assignments of error of the plaintiff in error; and it is further stipulated and agreed that the above-named court may make an order upon this stipulation amending and correcting said record by striking out the aforesaid words.

(Signed) JNO. C. BULLITT, JR.,
Attorney for the Plaintiff in Error.
HENRY J. GJERTSEN,
Attorney for the Defendant in Error.

Dated January 31st, 1893.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

THE NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error. } No. 206.

This matter being presented to this court upon an application on the part of the defendant in error for an amendment and correction of the record as returned to this court and as printed in said cause, and it appearing to this court from the stipulation of the respective parties made and filed in this cause that there is an error in said record, and that the words "containing all the evidence,"
29 found in the certificate to the bill of exceptions of the trial court, on page 24 of the printed record, *was* inadvertently inserted and interlined therein, and *was* not intended to be a part of said certificate at the time the same was signed:

Now, therefore, and on motion of Henry J. Gjertsen, the attorney for the defendant in error, and because of said stipulation, it is ordered that the following words, to wit, "containing all the evidence," as the same appears in lines nineteen and twenty of folio fifty, on page 24 of the printed record thereof, be, and the same *is* hereby, stricken out from the record and the transcript of the record as the same is returned to this court, and that from the printed record of said case said words be stricken out.

It is further ordered that the clerk of this court make the records conform to this order.

Approved by the court:

HENRY C. CALDWELL,
Circuit Judge.

Indorsed: United States circuit court of appeals, eighth circuit. Northern Pacific R. Co., plaintiff in error, *vs.* Ole J. Egeland, defendant in error. Stipulation and order correcting record. Filed Feb. 3, 1893. John D. Jordan, clerk.

And on the 24th day of February, A. D. 1893, in the record of the proceedings in said court is an entry of submission of said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1892.

NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error. } No. 206.

30 In error to the circuit court of the United States for the district of Minnesota.

FRIDAY, *Feb.* 24, 1893.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Jno. C. Bullitt, Jr., counsel for plaintiff in error, and concluded by Mr. Henry J. Gjertsen, counsel in behalf of defendant in error.

Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the first day of May, A. D. 1893, an opinion of the court was filed in said cause in the words and figures following, to wit:

31 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1893.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error. } No. 206. In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. J. H. Mitchell, Jr., Mr. John C. Bullitt, Jr., and Mr. Tilden R. Selmes, for the plaintiff in error.

Mr. Henry J. Gjertsen and Mr. Lars M. Rand, for the defendant in error.

Before Caldwell and Sanborn, circuit judges, and Thayer, district judge.

THAYER, district judge, delivered the opinion of the court:

This is an action in which the defendant in error recovered a verdict against the Northern Pacific Railroad Company for injuries that he claims to have sustained by jumping from a moving train in obedience to an alleged order of the conductor who was in charge

of said train. We are only required by the assignment of errors to determine whether the trial court erred in submitting the issue of contributory negligence to the decision of the jury, and we shall confine the inquiry to that question. It is insisted by the defendant company that the act of jumping from the train while it was in motion, was in itself such contributory negligence as precludes a recovery, and that the circuit court should have so declared at the conclusion of all the evidence.

The testimony that was offered by the plaintiff tended to show that he was a section man in the defendant's service, and had been so employed for about two months prior to the accident; that
32 on the day of the accident the plaintiff and several other section men, boarded a work-train which was in charge of one of the defendant's conductors and its roadmaster, for the purpose of riding for some miles to a station called Lake Park where they had occasion to stop to secure some of their tools and a hand car; that the train in question consisted of a caboose and several flat cars, and that the section crew took seats in the caboose when they boarded the train as it was their right and duty to do; that as the train neared Lake Park it slowed up and the foreman of the section crew thereupon called to his men to make ready to get off, and immediately proceeded to the front platform for the purpose of getting off; that the remainder of the crew followed the foreman and began to jump off while the train was still in motion; that the foreman and all of the other members of the crew, except the plaintiff, jumped off safely while the train was moving at the rate of from four to five miles per hour. The plaintiff also testified in his own behalf, that he waited on the platform of the caboose for the train to stop, after the other members of the crew, including the foreman, had jumped off; that as he was standing there, the conductor of the train told him to "get off," and again said "Hurry up, jump off now," and that in obedience to such command he did jump or step from the car to the platform of the station, having first thrown his shovel and pail with which he was encumbered when he was first ordered by the conductor to get off. He further testified that he relied on the order of the conductor and did not think there was any danger in obeying it; that the train was moving at the time at the rate of about four miles per hour; that he had had no previous experience in getting off from moving trains, and that but for the order of the conductor he would have remained on the car until the train came to a full stop.

It further appeared in evidence that the platform of the Lake Park station-house was only twelve or sixteen inches lower than the steps of the car from which the plaintiff had to jump, and that in the act of jumping the plaintiff in some manner fell on the platform and sustained some injuries.

The evidence for the defendant tended to show that in the matter of jumping from the train while it was in motion, the plaintiff acted of his own volition, and without any precedent order from the conductor. In other respects there appears to have been no material

controversary as to the circumstances under which the injuries were sustained.

In view of all the testimony, which we have stated with substantial accuracy, we think the trial court properly submitted the question of contributory negligence to the decision of the jury. We are of the opinion that the act of jumping or stepping from the train to the station platform, under the circumstances above disclosed, was not so obviously dangerous that the court should have adjudged the plaintiff guilty of contributory negligence even though he acted in obedience to the order of the conductor. It was for the
33 jury to say whether the conductor of the work-train gave the alleged order to "get off," and whether that was a negligent direction, and whether, in view of such order and all attendant circumstances, the plaintiff acted with that degree of prudence which a man in his situation and with his experience would ordinarily exercise. It would subserve no useful purpose to review all of the cases which have been called to our attention by counsel for the plaintiff in error, with a view of showing that one who gets on or off a moving train thereby assumes all risks of getting hurt, and is guilty of contributory negligence. Reibel *v.* Cincinnati, Ind., St. Louis & C. R'y Co., 17 N. E. Rep., 107; Railroad Co. *v.* Carter, 112 Ind., 26; Solomon, adm'x, *v* Manhattan R'y Co., 9 N. E. Rep., 430; Filer's case, 49 N. Y., 47; Porter *v.* Chicago & W. M. R'y Co., 44 N. W. Rep., 1054; Hunter *v.* Cooperstown & S. V. R. Co., 112 N. Y., 371, and 26 N. E. Rep., 958; New York P. & N. R. Co. *v.* Coulbourn, 16 Atlantic Rep., 208; Patton *v.* The Railroad, 96 N. C., 455; Jones *v.* Chi., Milw. & St. P. R'y Co., 43 N. W. Rep., 1114.

We have examined all of the citations with which we have been favored, and have reached the conclusion that it is not a rule of universal application that a person must be deemed guilty of negligence whenever he attempts to leave a train while it is in motion. The authorities above referred to show, we think, that under some circumstances a person may make such an attempt without being chargeable with negligence. And where, as in the case at bar, there is testimony tending to show that a person has attempted to leave a train pursuant to the order of its conductor, at a station where it was necessary to get off, and while the train was moving slowly, and in so doing has sustained injury—it should be left to the jury to say, in the light of all of the circumstances, whether such attempt was justifiable and whether the plaintiff exercised ordinary care.

Finding no error in the action taken by the circuit court, its judgment must be affirmed.

May 1, 1893.

34 And on the first day of May, A. D. 1893, in the record of the proceedings in said court is an entry of judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1893.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error. } No. 206.

In error to the circuit court of the United States for the district of Minnesota.

MONDAY, *May* 1, 1893.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On considration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and that Ole J. Egeland recover against the Northern Pacific Railroad Company the sum of twenty dollars for his costs herein and have execution therefor.

May 1, 1893.

And on the 24th day of May, A. D. 1893, a præcipe for writ of error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

35 NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error.

To the clerk of the Supreme Court of the United States:

Please issue a writ of error to the Supreme Court of the United States in the above-entitled action, and oblige,

(Signed) JAMES McNAUGHT,
TILDEN R. SELMES,
Attorneys for Petitioner.

Endorsed: No. 206. U. S. circuit court of appeals for the eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Ole J. Egeland, defendant in error. Præcipe. Original. Filed May 24, 1893. John D. Jordan, clerk.

And on the 24th day of May, A. D. 1893, an assignment of errors was filed in said cause in the words and figures following, to wit:

United States Supreme Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error.

Now comes the above-named plaintiff in error, The Northern Pacific Railroad Company, by James McNaught, its attorney, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the eighth
36 circuit there is manifest error, in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said circuit court of appeals, to wit:

(*a.*) The court erred in instructing the jury that, even in case the conductor of the work-train ordered the plaintiff to jump off while the train was in motion, such order was evidence of negligence, from which the jury might find that the defendant was guilty of negligence in this action.

(*b.*) The court erred in instructing the jury that it was for the jury to determine whether the plaintiff was guilty of contributory negligence, under all the facts and circumstances in the case, in jumping from the train while the same was in motion and moving at the rate of from four to five miles per hour.

Second. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of Minnesota to said circuit court of appeals, erred in making its order on the 1st day of May, 1893, affirming the judgment of the said circuit court and directing a mandate to issue to the circuit court of the United States for the district of Minnesota, directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

Third. That said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court and in not directing a new trial of the issues raised by the pleadings in said action.

And said Northern Pacific Railroad Company, the plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court for the district of Minnesota and the order entered
37 herein as aforesaid by the circuit court of appeals and the judgment of affirmance to be entered in said circuit court for the district of Minnesota upon said order of affirmance, for the errors aforesaid and for other errors in the record and proceedings aforesaid, be reversed, annulled, and held for naught, and that the plaintiff in error may be restored to all things which it hath lost by occasion of said judgments and order.

(Signed) JAMES McNAUGHT &
TILDEN R. SELMES,
Attorneys for Plaintiff in Error.

Endorsed: United States supreme court. Northern Pacific Railroad Company, plaintiff in error, *vs.* Ole J. Egeland, defendant in error. Assignment of error. Original. Filed May 24, 1893. John D. Jordan, clerk.

And on the 24th day of May, A. D. 1893, a supersedeas bond on writ of error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error.

Know all men by these presents that we, said Northern Pacific Railroad Company, a corporation created by and existing under an act of the Congress of the United States of America entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific
38 coast, by the northern route," approved July 2, 1864, by Tilden R. Selmes, assistant counsel, as principal, and Frank A. Seymour, of St. Paul, Minnesota, and William R. Merrian, of St. Paul, Minnesota, as sureties, are held and firmly bound unto the above-named Ole J. Egeland in the sum of four thousand dollars, lawful money of the United States of America, to be paid to the said Ole J. Egeland, his executors, administrators, and assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and the successors and assigns of said company, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas the above-named Northern Pacific Railroad Company has prosecuted a writ of error in the supreme court of the United States to the circuit court of appeals for the eighth circuit to reverse an order made by said United States circuit court of appeals herein, directing that a mandate issue to the circuit (court) of the United States for the district of Minnesota, which mandate directs said circuit court to enter judgment affirming the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it shall

fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'g'd) NORTHERN PACIFIC RAILROAD COMPANY,
By TILDEN R. SELMES, *Ass't Counsel.*
WILLIAM R. MERRIAM. [SEAL.]
FRANK A. SEYMOUR. [SEAL.]

(Witnesses to signatures:)
JOHN G. DRESEN.
C. B. WOLFE.

39 UNITED STATES OF AMERICA, }
District of Minnesota. }

William R. Merriam and Frank A. Seymour, being severally sworn, each for himself deposes and says that he is one of the sureties who executed the foregoing bond; that he, said William R. Merriam, is a resident and freeholder, and he, said Frank A. Seymour, is a resident and freeholder in said district of Minnesota and is worth the sum of four thousand dollars over all his just debts and liabilities.

(S'g'd) WILLIAM R. MERRIAM.
FRANK A. SEYMOUR.

Subscribed and sworn to before me this 12th day of May, 1893.

(S'g'd) JOHN G. DRESEN,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

Endorsed: Original. U. S. circuit court of appeals for the eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Ole J. Egeland, defendant in error. Bond. This bond and the sureties therein are hereby approved. St. Paul, Minnesota, May, 1893. (S'g'd) David J. Brewer, associate justice. These sureties are sufficient. (S'g'd) Walter H. Sanborn. Filed May 24, 1893. John D. Jordan, clerk.

And on the 24th day of May, A. D. 1893, a writ of error from the Supreme Court of the United States, directed to said United States circuit court of appeals, was filed in said cause, the original of which, with the clerk's return thereon, is hereto annexed and herewith returned.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company, plaintiff in error, and Ole J. Egeland,

defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

Allowed by—
DAVID J. BREWER,
Associate Justice.

[Endorsed:] United States Supreme Court. Northern Pacific Railroad Company, plaintiff in error, *vs.* Ole J. Egeland, defendant in error. Writ of error. Original. Filed May 24, 1893. John D. Jordan, clerk.

41 *Return to Writ.*

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Paul, Minnesota, this 3rd day of June, A. D. 1893.

JOHN D. JORDAN,
Clerk of said Court.

42 And on the 24th day of May, A. D. 1893, a citation, directed to the defendant in error, Ole J. Egeland, was filed in said cause, the original of which, with the admission of service endorsed thereon, is hereto attached and herewith returned.

43 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
OLE J. EGELAND, Defendant in Error.

To Ole J. Egeland, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof *next*, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Northern Pacific Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 16th day of May, A. D. 1893. DAVID J. BREWER,
Associate Justice.

44 [Endorsed:] United States circuit court of appeals for the eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Ole J. Egeland, defendant in error. Citation. Original. Service of within admitted this 20th day of May, A. D. 1893. Henry J. Gjertsen, att'ys for pl'ff. Filed May 24, 1893. John D. Jordan, clerk. Gjertsen & Rand, 47 Washington Ave., S.

45 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the above and foregoing transcript, consisting of 44 pages, contains a full, true, and complete copy of the transcript of record from the circuit court of the United States for the district of Minnesota, and of the papers filed and proceedings in the said circuit court of appeals, including the opinion of said circuit court of appeals, in a certain cause, No. 206, May term, A. D. 1893, wherein The Northern Pacific Railroad Company was plaintiff in error and Ole J. Egeland, defendant in error, as full, true, and complete as the originals of the same now remain on file and of record in my office. I further certify that the originals of the writ of error and citation are herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Paul, Minnesota, this 3rd day of June, A. D. 1893. JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,329. U. S. circuit court of appeals, 8th circuit. Term No., 238. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Ole J. Egeland. Filed June 9, 1893.

Office Supreme Court U. S.
FILED.
APR 14 1896
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 238.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

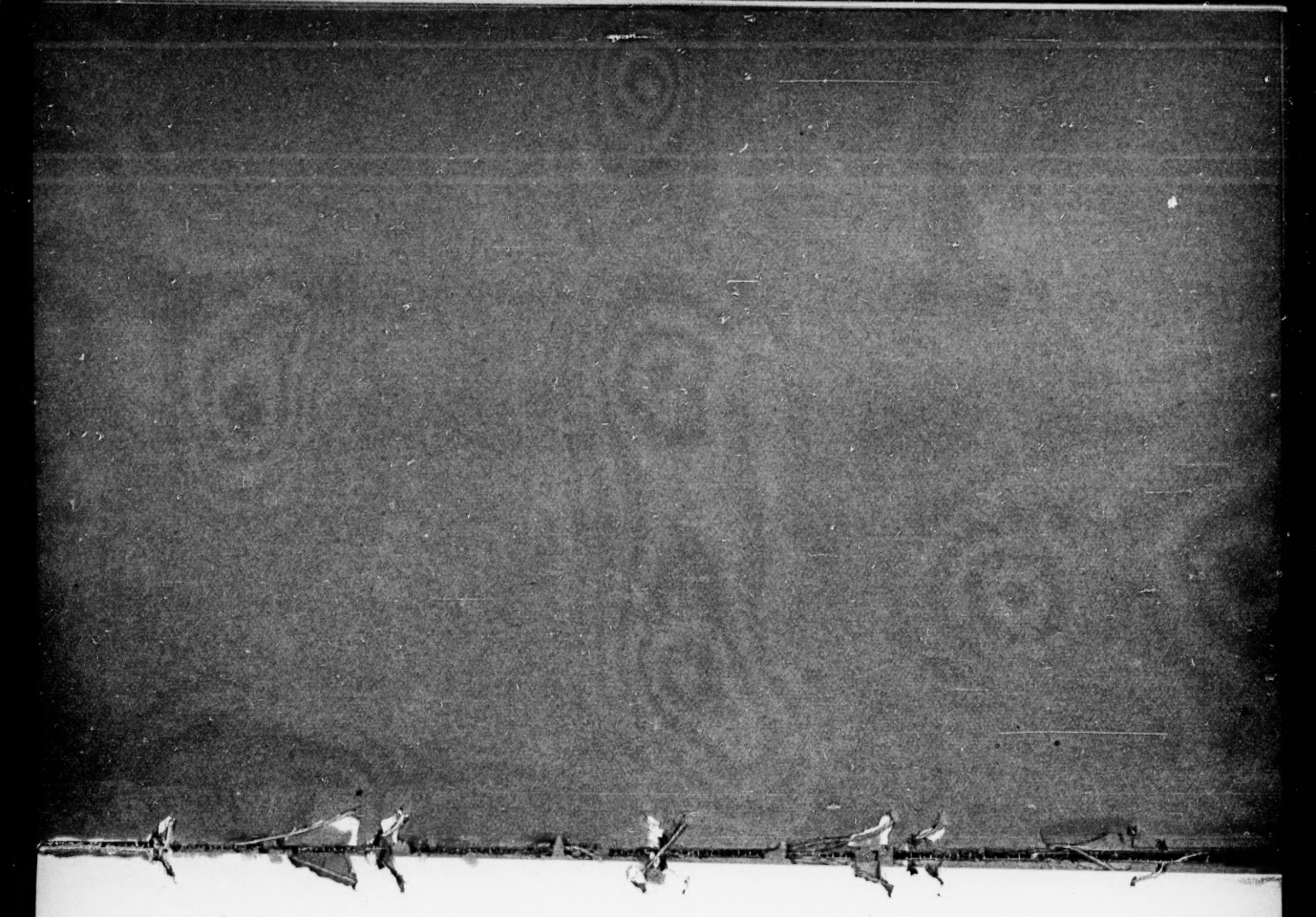
OLE J. EGELAND.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN,
Counsel for Plaintiff in Error.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 238.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OLE J. EGELAND.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the Circuit Court of Appeals for the Eighth Circuit. The case was brought by Ole J. Egeland in the United States Circuit Court for Minnesota. Plaintiff recovered a judgment which was affirmed in the Circuit Court of Appeals.

We shall state the facts most favorably to the defendant in error, as they were testified to by him. They are brief and appear on pages 15, 16 and 17 of the printed record. Egeland was a laborer, one of a section crew at work on the Northern Pacific Railroad in Minnesota. On September 13, 1890, the section crew being at work

near Lake Park, left their hand car at Lake Park station, taking a work train in charge of a conductor to go west a few miles. After working with the work train that day, the train brought them back to Lake Park at night, where they were to get off for their tools and hand car. At Lake Park is a station platform twelve to sixteen inches lower than the steps of a caboose. The men were riding in the caboose. When the train came to Lake Park it slowed down to four or fives miles an hour. Marke, the section foreman, jumped off onto the platform, and the other men followed; they followed Marke to the front platform of the caboose, the defendant in error being the last man out. When he got to the front platform the conductor told him to get off—to jump off now. The train was then moving four miles an hour. Egeland threw his dinner pail and shovel down on the platform *in order to get in a careful position*, and then with his face toward the engine jumped in the direction of the motion of the train. For some reason he fell on the platform and received the injuries complained of. The platform was in good condition, no obstructions upon it, and it was daylight.

Egeland testified that he would not have jumped but for the conductor's order; that he had not before this attempted to get off moving trains. At the same time he testified that he was particular to get off with his face toward the engine *because he did not want to fall;* that he did this to get a good position for jumping; that he knew this was the *safest and best way to get off.*

At the close of the testimony the plaintiff in error requested the court to direct a verdict for the plaintiff in error, which request the court refused, and the plaintiff in error duly excepted to the ruling. The court then submitted the case to the jury. (Record, p. 18.)

ASSIGNMENT OF ERRORS.

We assign as error that the court erred in not granting the request to direct a verdict.

ARGUMENT.

Notwithstanding Egeland's evidence that he did not think there was any danger in jumping, it is too plain for argument that he knew the act involved a certain degree of hazard and danger. He took precautions to minimize the danger; he laid down his dinner pail and shovel and faced the way the train was moving, because he knew that was the safest way to jump. The courts have uniformly held that, except in unusual circumstances, it is negligence to jump from

a moving train. *Garett v. Manchester & Lawrence R. R. Co.*, 16 Gray, 501; *Harvey v. R. R. Co.*, 116 Mass. 269; *Solomon v. R. R. Co.*, 103 N. Y. 437; *Jewell v. R. R. Co.*, 54 Wis. 610; *Butler v. St. P. & D. R. R. Co.*, 59 Minn. 135. The defendant in error must excuse himself for this apparently careless act, or must be held to have assumed all the risks incident to it.

He attempts to excuse himself by the order of the conductor. But if the risk was plain—if Egeland knew the danger—the direction of the company's agent was no excuse. That would be the ordinary case of a servant assuming risks. If a servant is directed by the master to work about a dangerous machine, and if the danger is apparent, known to the servant, he assumes the risk. The master's direction does not give the servant a right to hold him liable for injury from a plain risk.

The risk in this case was that involved in getting off a step moving four miles an hour, onto a stationery platform plainly open to view, twelve to sixteen inches lower than the step. The defendant in error being *compos mentis*, and of full age, knew as well as anyone that there was some small danger in this act, and just what the danger was. Some expert knowledge is necessary to estimate the dangers of high velocities, as they are not within the range of common experience. But every child from the time he has a cart or hand sled practices getting off of objects moving four miles an hour. This is just the rate of a brisk walk. Every ordinary man knows that there is some danger, and knows the exact source of danger in stepping off any vehicle moving four miles an hour.

The cases where injury occurs from an unexpected source—from a sudden jerk of the train, or from defect in the station platform—are not in point and will be readily distinguished. Here the injury came from a cause calculated and contemplated by the injured party before he stepped. He testifies that he got off with his face toward the engine because that was safest and because he didn't want to fall.

So the case is readily distinguished from those where the injured party has his attention distracted, or where he is under some urgent necessity to act, or between two dangers. The act of defendant in error was not sudden; it was deliberate. It was not induced by threats or coercion; he was safe on the train and was not obliged to jump. The request or order of the conductor was not different from the order of the master to work on a dangerous machine in the case above put, which is the common case in which the courts apply the rule of assumed risks.

Nor are cases in point where the injured party has been held excused by the suddenness of the act, or by the lack of opportunity for thought. The defendant in error deliberately planned his jump. He put down his shovel and dinner pail, and faced toward the engine so as to make his jump safe. He did not ask to stay on the car or object to getting off; he was not forced off; he might have stayed on the car.

We submit that the case is controlled by *Railroad Co. v. Jones*, 95 U. S. 439, 443. In that case a laborer, with the knowledge and perhaps the order of his superior, got on the pilot of the engine to ride to work. This court, after alluding to the fact that the place was one of plain danger, said: "The knowledge, assent, *or direction* of the

company's agents as to what he did is immaterial. As well migh the have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive." See also *Kresanowski v. N. P. R. R.*, 18 Fed. Rep. 229, 233–235. If the risk was plain and known to defendant in error, whatever that risk was, he assumed it. It is immaterial how slight or how great was the chance of injury. If so slight that a reasonable man could not apprehend it, then the conductor was not careless in giving the order, and a verdict should have been directed on that ground. But if the act was dangerous, the danger was known by Egeland, and the direction of the company's agent immaterial, as held in *Railroad Company v. Jones, supra; Roul v. The East Tenn., Virginia & G. Ry. Co.*, 85 Ga. 197.

C. W. BUNN,
Counsel for Plaintiff in Error.

SEP 28 189
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1895.

NO. 238.

NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OLE J. EGELAND,
DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

MR. HENRY J. GJERTSEN,
Counsel for Defendant in Error.

T. GULDBRANDSEN PUBL. CO., MINNEAPOLIS.

company's agents as to what he did is immaterial. As well might the have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive." See also *Kresanowski v. N. P. R. R.*, 18 Fed. Rep. 229, 233 235. If the risk was plain and known to defendant in error, whatever that risk was, he assumed it. It is immaterial how slight or how great was the chance of injury. If so slight that a reasonable man could not apprehend it, then the conductor was not careless in giving the order, and a verdict should have been directed on that ground. But if the act was dangerous, the danger was known by Egeland, and the direction of the company's agent immaterial, as held in *Railroad Company v. Jones, supra; Rail v. The East Tenn., Virginia & G. Ry. Co.*, 85 Ga. 197.

C. W. BUNN,
Counsel for Plaintiff in Error.

SEP 28 1895
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1895.

NO. 238.

NORTHERN PACIFIC RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

OLE J. EGELAND,

DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

MR. HENRY J. GJERTSEN,

Counsel for Defendant in Error.

T. GULDBRANDSEN PUBL. CO., MINNEAPOLIS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1895.

THE NORTHERN PACIFIC RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

OLE J. EGELAND,

DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

Assignment of Errors Insufficient.

The judgment of the circuit court of appeals should be affirmed for the reason,

FIRST:—because the assignment of errors in the record is not based upon any exception taken by the appellant in the trial court. The exceptions noted, (See pages 21 and 22 of record) are directed to an entirely different point than the matters set forth in the assignment of errors, and cover other parts of the court's charge to the jury, which are not here assigned as error.

SECOND:—because the exceptions of the plaintiff in error, noted at the trial of the case, are not based upon any part of the court's charge, for the reason that the trial court nowhere in its instructions to the jury, uses the language set out in the exceptions; thereto noted by plaintiff in error.

As we understand the law, and the rule of this and nearly all the courts of review, an exception taken to the charge of the court, or to any part thereof, must state specifically what part or portion of the charge is excepted to. This the plaintiff in error failed to do, because the record shows that the trial court in its charge to the jury, nowhere uses the language attributed to it in the two exceptions noted by plaintiff in error. The errors assigned being entirely directly to the court's charge, it was incumbent upon the plaintiff in error to set out the particular language used by the court, which is complained of, but this the plaintiff in error fails to do. As I understand the rules of this court, an assignment of error must be based upon a sufficient exception taken by the appellant at the trial, and where the assignment is directed to an exception taken to the court's charge, then it must set forth that part of the charge in *totidem verbis*. The plaintiff in error has failed to do this, and hence the judgment of the circuit court of appeals ought to be affirmed.

Statement of the Case.

Not knowing what statement of the case will be made by the plaintiff in error at the time of the preparation of this brief, but assuming that the same course will be pursued in this court as in the circuit court of appeals, we deem it necessary for the defendant in error to present a brief statement of the facts because we do not agree with the statement of the case made by the plaintiff in error, in that court.

I desire first to specifically call the court's attention to the important fact that the bill of exceptions in this case *does not contain all the evidence, nor does it purport to contain all the evidence and proceedings had at the trial of the action*, but simply sets forth what certain parts of the testimony offered by the respective parties *tended* to show, hence the Supreme Court can not be called upon to review the findings of fact made by

the jury upon any of the issues in the case, nor can it review any legal proposition, the determination of which requires an investigation into a disputed question of fact.

From the bill of exceptions it appears that testimony was introduced in evidence tending to show that plaintiff, for about two months had been in the employ of the defendant as a section man, working on defendant's line of railway between Audubun and Lake Park, in the State of Minnesota. That Lake Park lies west of Audubun, and plaintiff resided in the latter place. Six or seven men worked with him in the crew and their section foreman was Ole Morke. On the morning of September 13th, 1890, the section crew, as usual, including the plaintiff, left their home at Audubun on a hand-car, for the purpose of working on the section of defendant's railroad between Audubun and Lake Park. This was the usual mode whereby the section crew went to their work, carrying their tools with them on the hand-car. That on this day, while plaintiff and his section crew were working on the line of railway between Audubun and Lake Park, the work train of the defendant, in charge of the conductor, Potter, and the roadmaster, Scougale, came in the morning, from the east, proceeding west, and took this section crew to Hawley, west of Lake Park, in order to do some work necessary to be done at that point. That the hand-car and the tools of plaintiff's section crew were left at Lake Park, and after completing the work at Hawley the section crew including this plaintiff, was taken on board the train for Lake Park. It appeared from the evidence that it was *necessary* and *it was the duty* of the section crew in which plaintiff worked, to get off at Lake Park in order to take the hand-car and tools left by them in the morning and convey the same to Audubun for the purpose of using the same in the next day's work.

That R. G. Potter was the conductor on the work train in the employ of the defendant, and he had the *exclusive control of the men, including the plaintiff*, from the time they boarded the train in the morning, until they left the train in the evening, *and the conductor, during the day, directed the men*, including the plaintiff, what to do, and at all times controlled the movements of the train and gave all orders with reference to the starting and stopping of the same; *and it was the duty of the plaintiff to obey the orders of said conductor from the time he boarded*

the train in the morning until he left it in the evening. This was conceded by the plaintiff in error at the trial of the case.

The work train consisted of several flat-cars and a caboose. In riding from Hawley to Lake Park, plaintiff and his section crew were seated in the caboose, and as the train approached Lake Park in the evening, the foreman of plaintiff's section crew, called out to his men to get ready to get off at Lake Park. The train slacked up its speed as it approached the Lake Park Station. At Lake Park there is a ware-house west of the station, then further east the station, and the depot building are located. The platform at the station runs down to and opposite the warehouse. While the train was still in motion the foreman of the section crew dropped off and landed on the platform opposite the warehouse. The other section men, including the plaintiff, hurried to the front platform of the caboose, following Morke, their foreman, as quickly as possible. The plaintiff was the last man of the crew proceeding out on the front end of the platform of the caboose, *and he, on reaching the platform, waited for the train to stop so that he could get off;* and when plaintiff came near the front of the platform he met the conductor of the train and the conductor said to him "*Get off, Fellow.*" Plaintiff had a tin dinner pail in one hand and a shovel in the other, and while plaintiff stood upon the front platform of the caboose, *waiting for the train to stop* conductor Potter again said "*Hurry up. Jump off now.*" The train at this time was moving at the rate of from four to five miles per hour, and thereupon plaintiff threw his dinner pail and shovel down upon the platform in order to get in a careful position, and in obedience to the order of the conductor, he jumped in the same direction as the train was moving, but when he struck the platform, for some reason he fell and received the injuries complained of.

At the time plaintiff jumped from the train the same was moving *about as fast as a man could walk, or at the rate of about four miles per hour.* It was further shown by the evidence that from the time Morke spoke to the section crew telling them to get ready to jump off, up to the time plaintiff jumped from the train, was about five minutes, and that from the time the conductor first ordered plaintiff to jump and the time the order was obeyed was about two or three seconds. The platform at the place where plantiff jumped from the train was

from twelve to sixteen inches below the lower step of the caboose, and was in a good condition, and there were no obstructions of any kind lying upon it at the place where plaintiff jumped. The train, after plaintiff got off, *did not stop, but increased its speed and continued on its way to Audubun, where it slaked up its speed in the same manner as it had at Lake Park, to let off some of the workman, living there*, and then continued on its way to Staples.

Plaintiff testified that *if the conductor had not ordered him to get off, he would have stayed on board the train until the train stopped at some place, and that he relied opon the order of the conductor, and did not think there was any danger in obeying the same.* That before he had jumped, pursuant to the order of the conductor, he had seen three other men jump off in safety, *and that he went upon the order given him.* Plaintiff also testified that he had no experience in jumping off from moving trains, and that this was the first time he had ever attempted to do so.

It also appeared from the testimony that plaintiff was a foreigner and did not understand the English language very well and often mis-understood the questions put to him upon cross-examination.

The conductor of the train, Mr. Potter, testified in behalf of the defendant, that he did not tell the plaintiff to get off, but that on the contrary, he told the men, including the plaintiff, not to hurry, that he would let them off. But there was an abundance of evidence given on behalf of the plaintiff by witnesses Charles Lind, Andrew Friedlund and Christ. Boresen, on the trial of the case, not included in the bill of exceptions, showing that the conductor, Potter, gave the order directing the plaintiff to jump off. Additional facts proven by plaintiff not appearing in the bill of exceptions are referred to in the able charge of the trial court, found on pages 18 – 19 and 21 of the record.

Argument.

Should our objection to the sufficiency of the assignment of errors be overruled, and the case heard upon its merits, there can be only one question considered on this appeal, and that is whether the trial court erred in submitting the issue of contributory negligence to the decision of the jury.

Was the Question of Plaintiff's Contributory Negligence Properly Submitted to the Jury?

The trial court charged the jury (Page 20, record):—"I instruct you, that to jump from a railroad train moving at a rate of speed of four or five miles an hour, is presumably a negligent act *per se* and that in order to rebut this presumption of negligence, plaintiff must satisfy you that he was ordered and directed to do so by the conductor, Potter, and he must do that by a preponderance of the evidence. Plaintiff admits jumping, and he attempts to excuse the act, and in order to do that, he must satisfy you that Potter ordered and directed him to do so, and also that the order was calculated to divert his attention from the danger of jumping, or that the order created a situation which interfered with his free agency, to some extent, and such order created a confidence that the attempt could be made with safety.—If the danger to be met by jumping was manifestly great; if it was obviously dangerous, so that an ordinary prudent person in the same situation would not have jumped, then it was contributory negligence to obey the direction of the conductor, if the same was given. But if the danger was not so great, under the circumstances, but that the plaintiff might reasonably believe that he could obey it, *by taking proper care*, particularly as his superior commanded it, and if his purpose was to obey, in pursuance of his sense of duty, and without waiting to think or consider the risk or danger, he jumped, then it would not be contributory negligence to obey and jump." It seems to me that this portion of the charge taken in connection with other parts thereof, very fully and clearly states the law applicable to the case at bar, and is abundently sustained by the weight of authority in this country. Contributory negligence is generally a question of mixed law and fact, which under proper instructions, must be left to the jury. Plaintiff in error does not contend but that the case was a proper one for the jury. His assignment of errors only pretends to question the correctness of the court's charge, and if the case is, as was conceded, a proper one for the jury, I fail to understand wherein the court could have charged

the jury any more favorable to the defendant than was done in this case.

It appears from the complaint and the bill of exceptions that plaintiff was a good and faithful servant; anxious to perform his duty towards the defendant. He was upon this work train, being transported homeward. It was necessary and a part of his duty to take the hand-car and tools from Lake Park to Audubun that evening. This the defendant knew. When the train arrived at Lake Park, he together with the other men of his crew, prepared to alight from the train. He was standing upon the platform waiting for the defendant to perform its duty in stopping the train to let him off. He saw other members of his crew get off, *persumably under the direction of the conductor*, but still he waited for the train to stop. While thus waiting, the conductor, his superior, his vice-principal, the sole representative of the defendant, commands and directs him to get off, while the train was going slowly. He obeyed the order pursuant to his sense of duty, believing that he could do so without any danger. He had no experience in getting off from moving trains. This was his first attempt. In his simple way he says he went because he was ordered, he relied upon the order; and would not have jumped if the order had not been given. Under those circumstances the law will not say that the plaintiff was guilty of contributory negligence. On the contrary the law says that where a master places his servant in a position of danger by his direct order and command, the law looks with indulgence upon the conduct of the servant under such circumstances, and will not hold the servant to that strict accountability as to contributory negligence, that it otherwise does.

"This may happen where the master orders his servant into a situation particularly dangerous. The duty of the servant being obedience, the law looks with indulgence upon his negligence in placing h mself in a position of danger, where the master commands him to do so. Moreover, the law remembers that the respective situations of the master and servant are unequal and excuses the servant for deferring to the superior judgment of the master. If therefore, the master orders his servant into a situation of danger, and he obeys, and he is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence unless the danger was so glaring than no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose.

Thompson on Negligence, Vol. 2. Pages 974 and 975.

"Another important inquiry is, whether he performed the service *voluntarily* or by the express command of the master, or some person whom the master had placed in command over him, because if he was directed to do the act, and the doing of it would not *necessarily* or *inavitably* expose him to danger, he could not be said to have had the particular risk in contemplation, and consequently did not assume it."

Woods Master and Servant, Section 387.

The servant, in obeying the command of the master is not guilty of contributory negligence, even though he may have reason to think there is danger attending the execution of his master's orders, unless the danger was so glaring that no prudent man, *of his class* under the same circumstances, would have entered into it even under orders.

Why was the danger, in the case at bar, not so glaring but that a prudent man of plaintiff's station in life, under the same circumstances, would have done as he did? First: because the train was not going faster than a man could walk, about four miles per hour, Second; because the other men of plaintiff's section crew preceding the plaintiff, jumped off the train in safety, while the same was in motion, *persumably also under the direction of the conductor*, Third: because the order was given by a man of experience in operating trains and doing railroad work. Conductor Potter was a man of sufficient knowledge and experience in the operation of railroad trains, to be entrusted with the position of railroad conductor by the defendant company, hence plaintiff would naturally have faith and reliance that the order was a proper and safe one for him to execute in the line of his duty.

The courts have repeatedly held that it is not as a matter of law negligence *per se* for persons to get on or off moving trains going from four to eight miles per hour, where a person has been invited or directed to do so by the management in charge of the train, but that it is a question of mixed law and fact to be left to the jury under proper instructions.

"One who obeys the instructions and directions of another upon whose assurance he has a right to rely, can not be charged with contributory negligence at the instance of such other, in an action against him for injuries sustained in attempting to follow out the instructions."

Deering on Negligence, Sec. 24.

Any other rule would be unjust and inequitable. It would permit the master to take advantage of his own wrong.

The following citation from the Supreme Court of North Carolina we give at length because it is a case particularly applicable to the facts in the case at bar.

"It appears that the section master was actively prosecuting the work of the defendant he had charge of, and by his command the plaintiff and another fellow servant in that conversation, got upon a passing freight train of cars to go some distance to a place where proper work was to be done. The train was heavily laden, and going swiftly—how swiftly does not appear—up an ascending grade half a mile in length. While it was thus moving and passing by the place where the work referred to was to be done, the section master commanded the appellant to jump from the train, which command he at once obeyed, and in doing so sustained the injury, because of which he complains in this action. It seems that the command was given and promptly obeyed, without hesitation. It was rash, negligent, unreasonable and unwarranted. But the danger to be encountered in obeying it was not so manifest and so great, as under the circumstances, to render a prompt obedience to it contributory negligence on the part of the appellant. An ordinary laborer on railroads, one of ordinary experience, might make such a leap without injury. *He might not unreasonably believe that he could, taking proper care, especially so when commanded to do so by a railroad employee of long experience, who had a right to command him in the course of his duty.* While to jump from a rapidly moving train of cars is very hazardous and ordinarily to do so is negligence, *it is not contributory negligence where the plaintiff, laborer on the railroad, is suddenly commanded by his employer or his agent, to do so in the course of his employment, and the command is at once obeyed from the sense of duty.* — The laborer obeys the commands promptly, moved only by a faithful sense of duty, and as a consequence suffers serious injury. In that case the injured party does not in legal contemplation, contribute to his own injury. The facts and circumstances were such as that he might suddenly, not unreasonably, believe that the command was a proper one, that he ought to obey."

Patton vs. West N. C. R. Co., 96 N. C. 455. (s. c. 1 S. E. 869.)

In the pay-car case decided by the Supr_me Court of Maryland, it appeared that the defendant was indebted to the plaintiff on account of services rendered and when the defendant's pay-car came to the station to pay off employees, the plaintiff in company with the station agent entered the car to receive the amount due them, and immediately after the amount was paid

him the car started, and while moving at the rate of from four to five miles per hour, the plaintiff jumped off and broke his leg. This court held that the question of contributary negligence was for the jury.

New York, P. & N. R. Co. vs. Coulbourn, 69 Md. 360.
(s. c. 16 Atlantic 208.)

"The test of prudence in these cases in analogy to that applied to ordinary cases of contributary fault is that which a prudent servant of the same class, using such prudence and judgment as such persons usually possess and no more, might reasonably be expected to apply to the particular case. A conductor should be required to exercise the care and judgment of an ordinary prudent conductor; an engineer, that of an ordinary prudent engineer; a skilled mechanic, that of an ordinary prudent mechanic of that same class; but a brakeman or a common laborer, only that which can fairly be expected from a brakeman or a laborer. This has been too often overlooked; but it is well settled in other branches of the law of contributory negligence, and it must be followed here."

Sherman & Redfield on Neg. Vol. 1, 212.

Cases of Passengers Alighting from and Boarding Moving Trains.

The courts have almost uniformly held that a passenger is warranted in obeying the directions of the agents and servants of the carrier, in boarding or alighting from a moving train, unless obedience to such directions exposes him to an obvious risk which a prudent man would not incur, but where there is a doubt whether the speed of the train was so rapid as to render it clearly dangerous, to get off, that fact must be left to the jury.

"Getting on or off a vehicle while in motion is a familiar instance of negligence in the plaintiff, almost always fatal, to a recovery for the injuries sustained in part for the negligence of the carrier at the same time. Getting on a starting railroad car while motion is accelerating, is usually more dangerous than getting off a car which is coming to a stop. There are, however, cases in which such an act may be excused as being on the whole prudent, under the particular circumstances, thus, if the motion of the car was not very rapid, and the conductor *directed or even advised* a passenger to get on or off without stopping the car, the latter would have a right to rely upon this advice."

Sherman & Redfield Neg. Vol. 2. Sec. 520.

In a case before the Supreme Court of Texas it appeared that the defendant went to a flag station on defendant's road for the purpose of taking passage. That he flagged the train and the signal was seen; that the train did not stop, but as it passed, the conductor seized a coat upon his arm and told him to jump on, and that he did jump on, and was thrown down and received the injury complained of. The plaintiff testified that he did not know how fast the train was running; that it was difficult to tell the speed of a running train, but that he thought at the time that, he could board the train with safety. It also appeared from other testimony that the train ran from six to eight miles per hour. The court held that it could not say as a matter of law that the plaintiff was guilty of contributary negligence, or that the conduct of the plaintiff in attempting to board the train was manifestly negligent. It was for the jury to say whether

the danger of boarding the train when it was in motion was so apparent as to make it the duty of the passenger to desist from the attempt.

Kansas & G. S. L. R. Co. vs. Dorough, 72 Texas 108.
(s. c. 10 S. W. 711.)

"It is negligent and unwarrantable conduct on the part of a conductor in charge of a train to notify or advise the passenger to leave the train while in motion, under circumstances likely to expose him to accident or injury."

Jones vs. Chicago, M. & St. P. R. Co. 43 N. W. 1111
(Minn.)

In this case the Supreme Court of Minnesota lays down the rule that unless a train is moving very slowly and the circumstances are especially favorable, it is prima facie negligence for a passenger to attempt to alight or jump from a moving train. The circumstances may, however, be such as to render the question a proper one for the jury. He may be justified in any particular case, in relying upon the superior knowledge of the conductor as to the speed and movement of the train, and other circumstances, *and in following his directions*, particularly when notified to act promptly, to prevent being carried beyond a station.

The question of negligence in any case is clearly a mixed question of law and fact and is never taken from the jury except in very clear cases.

Filer vs. R. R. Co., 49 N. Y. 47.

In the Filer Case the plaintiff was injured by getting off a car when it was in motion. It was proved in the case that when the train arrived at the place where the plaintiff desired to get off, the train ran very slowly, but did not come to a full stop; and that the brakeman told the plaintiff to get off, and in attempting to do so she was injured. The court says: "That there was more hazard in leaving the car while in motion although moving

ever so slowly, than when it is at rest, is self-evident; but whether it is imprudent and careless to make the attempt, depends upon circumstances;" and held that, under all the circumstances, it was proper to submit the question of contributary negligence to the jury. The case came before the court again in the 59th N. Y. 351, and it was then held by the court that if the Brakeman directed her to get off while the cars were in motion, she had a right to assume that she could get off with safety, although the train was in motion, following another passenger who had got off safely. The court says: "The employees upon a train, including brakemen, are in the line of their duty in assisting passengers in getting on and off the train and in directing them in procuring seats. Passenger rightly assume that these persons are familiar with all the movements of the train, and know whether they can, under the particular circumstances, get on or off and move upon the train with safety. When the conductor or a brakeman directs a passenger to get off the train, although in motion, such passenger will naturally assume that he knows that it is entirely safe or he would not give the direction."

In Clark vs. Street Railway Co., 36 N. Y. 135, the court held that if a passenger is riding upon a platform of a car in a place of danger, his negligence is prima facie established; but that he may rebut that presumption by showing that he was riding there at the invitation of those having the car in charge.

In McIntire vs. Railway Company, 37 N. Y. 287, it was held that "It is not negligence in law for a passenger to follow the direction given by a servant of a railroad company, and to pass from one car to another while the same are in motion. Whether in such case it is negligence is a question for the jury."

I think it can be stated as a general proposition that passengers are warranted in obeying the directions of the agents and servants of the carrier, unless such obedience leads to known dangers which a prudent man would not encounter; and whether the danger was so apparent as to have made it the duty of the passenger to desist from the attempt, in obedience to the order or invitation is, in nearly every case, a question of fact to be left to the jury.

Stager vs. Ry. Co., 119 Pa. St. 37 (s c 12 At. Rep. 821.)

Connor vs. Ry. Co., 105 Ind. 62 (s c 4 N. E. 441.)

Ry. Co., vs. Swift, 26 Ind. 459.

R. R. Co., vs. Hoglund, 78 Ind. 203.

R. R. Co., vs. Fix, 88 Ind. 381.

R. R. Co., vs. Buck, 96 Ind. 346.

R. R. Co., vs. Cantrell, 37 Ark. 519.

Fowler vs. Ry. Co., 18 W. V. 579.

Hickey vs. R. R. Co , 14 Allan 429.

R. R. Co., vs. Aspell, 23 Pa. St. 147.

R. R. Co., vs. Boyer, 97 Pa. St. 91.

R. R. Co. vs. Horst, 93 U. S. 297.

R. R. Co. vs. Person, 49 Ark. 182 (s. c. 4 S. W. 755.)

Deleware & Hudson Canal C. vs. Webster, 6 Atlantic Rep. 841.

Raben vs. Central Iowa Ry. Co., 74 Ia. 732 (s. c. 34 N. W. 621.)

Covington vs. Western R. R. Co., 81 Ga. 273.

In Louisville R. R. Co. vs. Crunk (Ind.) 21 N. E. 31, the court held that upon the facts in the case, it appearing that the train had been moving four and a half miles an hour when plaintiff alighted from the train at the invitation of the defendant company, it could not say as a matter of law that such act of alighting was negligence, so as to prevent a recovery for the injury sustained. "The fact that a person voluntarily alights from a moving train is not a conclusive presumption of negligence on his part. The rate of speed the train has acquired, the place and all the circumstances connected with the alighting, are to be taken into consideration, in determining whether or not the person was guilty of negligence on his part, in leaving or attempting to leave the train. The degree of speed would of itself make the person guilty of negligence in one case, and under some circumstances, would not under others."

I could, without difficulty, cite a large number of additional authorities upon this question, but it seems hardly necessary.

There is no set rule by which the court is to determine the question of contributary negligence. It must largely depend upon the particular circumstances and facts of the case; but so far as similar cases have been passed upon by the courts, I feel free to say that the result has been favorable to the injured party, and the principles of law annunciated in those cases are favorable to the contention of the defendant in error. From the foregoing authorities cited, the rule must be said to have been established, that it is not always such negligence as will preclude a recovery, for a passenger to alight from a moving train, going at a slow rate of speed, upon the invitation of the person in charge thereof, for the reason that the passenger has a right to rely upon the superior knowledge of the conductor or brakeman in charge. If such is the rule of law applicable to passengers, how much stronger is the case where the relation of master and servant exists, and where the servant, also being a passenger under the control of the conductor as his superior and vice-principal, and being under obligation to obey, the orders and directions of such conductor, because he is his master, or stands in the place of his master. The passenger consults only his convenience, relying upon the judgment of the conductor; the servant obeys the order from a sense of duty. From long training the will of the master controls the actions of the servant. The order of the master is supreme with him. A man accustomed to serve can not be said to be free to determine the consequences of his master's orders. Therefore the law throws about him its protecting arms and remembers that the respective situation of master and servant are unequal and excuses the servant from deferring to the superior judgment of the master.

I beg leave to call the court's attention to the able opinion of the circuit court of appeals, delivered by Judge Thayer, in this case, found on pages 26, 27 and 28 of the record, and in conclusion the court says: "We have examined all of the citations with which we have been favored, and have reached the conclusion that it is not a rule of universal application that a person must be deemed guilty of negligence whenever he attempts to leave a train when it is in motion. The authorities above referred to show, we think, that under some circumstances, a person may make such an attempt without being chargable with negligence. And where, as in the case at bar, there is testimony

tending to show that a person has attempted to leave the train pursuant to the order of its conductor, at a station where it was necessary to get off, and while the train was moving slowly, and in so doing has sustained injury—it should be left to the jury to say, in the light of all the circumstances, whether such attempt was justifiable and whether the plaintiff exercised ordinary care."

It seems to me that if the case was to be submitted to the jury, and plaintiff in error concedes this, it would be difficult to draft a charge more favorable to the defendant company than was given by the court in this case.

The able trial judge denied defendant's petition for a new trial; the circuit court of appeals found no errors in the action taken by the circuit court; Therefore the judgment of the circuit court of appeals should be affirmed:

First; because the errors assigned, to the courts charge, are not based upon any sufficient exception taken thereto, and

Second; because the case was fully and fairly submitted to the jury by the trial court and there are no errors in the charge or in any of the proceedings of the circuit court, or the circuit court of appeals.

Respectfully submitted,

HENRY J. GJERTSEN,

Counsel for Defendant in Error.

Minneapolis, Minn.

APR 20 1896
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 238.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OLE J. EGELAND.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Supplemental Brief For Defendant in Error.

HENRY J. GIERTSEN,
Of Counsel of Defendant in Error

tending to show that a person has attempted to leave the train pursuant to the order of its conductor, at a station where it was necessary to get off, and while the train was moving slowly, and in so doing has sustained injury—it should be left to the jury to say, in the light of all the circumstances, whether such attempt was justifiable and whether the plaintiff exercised ordinary care."

It seems to me that if the case was to be submitted to the jury, and plaintiff in error concedes this, it would be difficult to draft a charge more favorable to the defendant company than was given by the court in this case.

The able trial judge denied defendant's petition for a new trial; the circuit court of appeals found no errors in the action taken by the circuit court. Therefore the judgment of the circuit court of appeals should be affirmed:

First; because the errors assigned, to the courts charge, are not based upon any sufficient exception taken thereto, and

Second; because the case was fully and fairly submitted to the jury by the trial court and there are no errors in the charge or in any of the proceedings of the circuit court, or the circuit court of appeals.

Respectfully submitted,

HENRY J. GJERTSEN,

Counsel for Defendant in Error.

Minneapolis, Minn.

Office Supreme Court U. S.
APR 20 1896
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 238.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

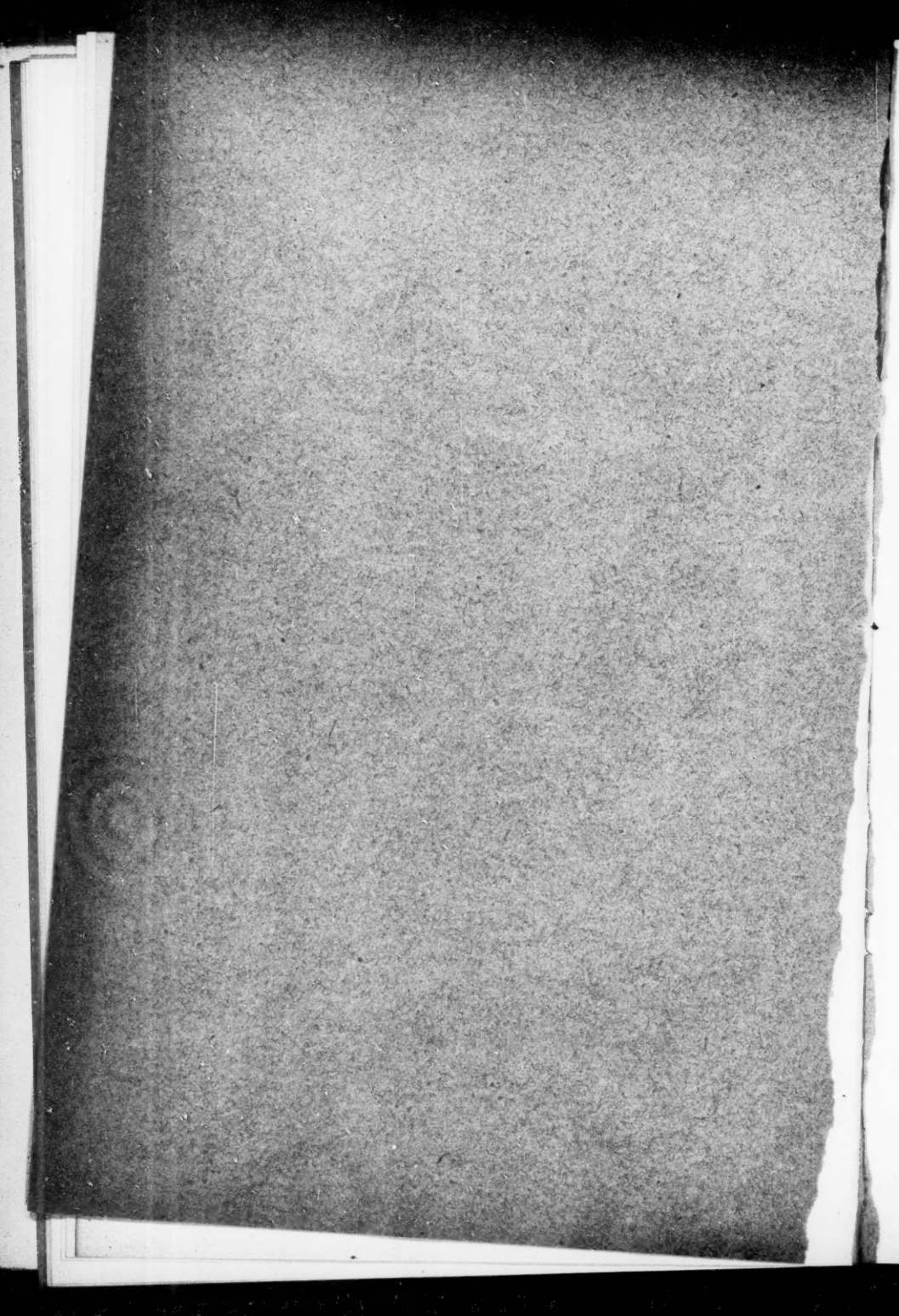
vs.

OLE J. EGELAND.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Supplemental Brief For Defendant in Error.

HENRY J. GJERTSEN,
Of Counsel of Defendant in Error



RAILROAD COMPANY vs. EGELAND.

No. 238.

SUPPLEMENTAL BRIEF

FOR

DEFENDANT IN ERROR.

The cases relied on by the plaintiff in error holding that it was negligence for the plaintiff to jump from the moving train are not in point.

Gavett vs. R. R. Co., 16 Gray 501, is a case where the plaintiff voluntarily left the car while it was in motion. There was no direction or order of the conductor to distract her attention or disturb her thoughts. She acted of her own free will and accord.

Harvy vs. R. R. Co., 116 Mass., is also a case where the plaintiff acted of his own free will and accord, in boarding a train while in motion. There was no circumstances in this case to excuse the act.

Jewell vs. R. R. Co., 54 Wis., 610, is a case where a woman was warned not to get off the car while it was in motion; but voluntarily did so and sustained the injuries complained of.

Solomon vs. Manhatan R. R. Co., 103 N. Y. 437, cited by the plaintiff in error, lays down the law *ver batum* as charged by the trial Judge in the case at bar. On page 442 the Court in its opinion says: "To alight from a moving train is presumably and generally a negligent act *per see*, and in order to rebutt this presumption and justify a recovery—it must appear that the passenger was by some act of the defendant put to an election between alternative

dangers, *or* that something was done or said, *or some direction was given to the passenger, by the person in charge of the train, or* some situation was created which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.

In the last case the injured party voluntarily attempted to get on the train. There was nothing to interfere with his free agency. He was not influenced by any command or direction of the person in charge of the train, hence the Court held the defendent not liable.

If my objections, urged in my brief, heretofore filed, to the hearing of this case upon the merits, should be overruled, then I would call the Court's attention to the fact that the errors assigned (See page 30 of Record) are not argued in the brief of the plaintiff in error. The assignment of errors only raise the question as to the correctness of the law as laid down by the Court in its charge to the jury, and cannot be construed to include the correctness of the ruling of the Court upon defendants motion to direct a verdict. The plaintiff in error abandoned that question when it failed to include it, in its assignment of errors. I therefore claim that the error attempted to be argued by the plaintiff in error is not entitled to consideration.

In order that a reversal can be had in this case, it must be held as a matter of law that to get off from a moving train in obedience to the express command of the conductor, the train going from 4 to 5 miles an hour, is conclusively a negligent act *per see*. This is not the law. Examining the charge to the jury, the Court will find that it was instructed to the effect, that the act was *per see*, presumably negligent, and that the burden rested upon the plaintiff, to overcome that presumption, and the court showed how it must be overcome. The jury by its verdict found from the evidence that this legal presumption was fully removed.

The question as to the sufficiency of the evidence to sus-

tain the verdict, *is not, nor can it be* raised, in the absence of a record containing all the evidence.

To hold with the contention of the plaintiff in error, this Court must conclude that as a matter of law, it is the absolute duty of the servant to rebell and disobey the master's specific order and command, if there be some danger attending the execution of it, not withstanding, as in this case, the servant did not know nor did he think there was any danger at the time of action; bnt relied upon the order.

The Courts hold, it is true, that the servant on entering the master's service, assumes all the ordinary risks incident to the service. This, to my mind, is pure legal fiction; but it is the law and hence "useless to kick against the pricks;" but no court ever held that servant assumes the risks incident to the execution of the express command of the master, where such risks were not obvious or known to the servant. To so hold would be the rankest injustice and a violation of the elementary principles of law, equity and good conscience.

We may be congratulated that the question of vice principle or fellow servant is not in this case, particularly in view of the late decisions of this Court upon that question.

In view of the English and earlier American decisions, upon the fellow servant question I can appreciate how difficult it may seem to the minds of some of the judges to take an advance stand upon that question; but I am at loss to surmise upon what tenable grounds, the plaintiff in error, can expect a reversal in this case.

The principal case relied upon and cited by the plaintiff in error is R. R. Co. vs. Jones 95, U. S. The facts in that action clearly distinguish it from the case at bar. Jones was told by the conductor or person in charge, to get on anywhere, that the train was late and he must hurry. It was left entirely with him to chose the place to ride. He was not ordered or commanded to ride upon the pilot. He was free to chose for himself, he made his selection, of his own accord, and was bound to bear the conse-